SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND HYGRADE FOOD PRODUCTS CORPORATION

No. 607

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND HYGRADE FOOD PRODUCTS CORPORATION

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from D. C. U. S., Southern New York	1	1
Præcipe for transcript of record on appeal of A., T. & S. F. Ry. Co. et al:	2	1
Amended petition	5	3
Exhibit 1—Complaint before I. C. C., Docket No. 24375	22	16

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—5931-C

	Original	Print
Exhibit 2—Motion to amend complaint before I. C. C., No. 24375	28	22
Exhibit 3—Report of I. C. C., Docket No. 24375	31	24
Exhibit 4—Order of I. C. C., Docket No. 24375	45	37
Answer of United States	48	38
Answer of I. C. C.	54	42
Order to show cause	59	46
Intervening of Union Stock Yard and Transit Co. of Chicago	61	47
Petition of Hygrade Food Products Corp. for leave to intervene	64	48
Order granting leave to intervene	67	50
Answer of intervenor, Hygrade Food Products Corp.	69	50
Opinion, Manton, J.	75	54
Final decree	86	61
Notice of petition for appeal	88	62
Petition for appeal	90	63
Assignments of error	91	64
Motion for stay of order of I. C. C.	95	66
Order allowing appeal	99	70
Order staying order of I. C. C.	100	70
Bond on appeal (omitted in printing)	103	
Notice of motion for order of severance	107	71
Motion for order of severance	109	73
Order granting severance	110	73
Notice of narrative statement of evidence, etc.	112	75
Order approving narrative statement of evidence, etc.	114	76
Stipulation as to transcript of record	116	77
Order of United States Supreme Court staying order of I. C. C.	118	79
Bond on stay (omitted in printing)	120	
Citation and service (" " ")	127	
Clerk's certificate (" " ")	130	
Præcipe for transcript of record on appeal of Union Stock Yard and Transit Co. of Chicago	131	80
Intervention of Union Stock Yard and Transit Co. of Chicago	133	81
Order granting severance	135	83
Motion for order of severance	137	83
Notice of motion for order of severance	138	84
Notice of petition for appeal	140	85
Order allowing appeal	146	87
Assignments of error	148	88
Petition for appeal	153	91
Recital as to bond on appeal	155	..
Citation and service (omitted in printing)	156	
Order as to transcript of record	160	93
Clerk's certificate (omitted in printing)	162	
Order to transmit original narrative statement of evidence	165	94
Affidavit of Charles N. Fiddler	166	94
Narrative statement of evidence	169	95

	Original	Print
Caption	169	95
Appearances	169	97
Narrative statement of evidence before I. C. C., Docket No. 24375	171	97
Appearances	171	97
Statements of examiner and counsel	172	98
Testimony of William W. Adams	173	98
G. A. Hoffelder	226	132
Augustus Downing	228	133
Edward E. Hubbard	231	135
Edward B. Greer	239	140
Leo S. Joseph	245	144
William D. Adams (recalled)	246	145
O. T. Henkle	248	147
E. L. Kemp	266	160
William J. O'Brien	268	162
O. T. Henkle (recalled)	287	174
S. H. Gillette	288	175
J. A. Behrle	291	177
W. C. Watson	298	182
...ment of points to be relied upon and designation as to ...ting record, Case No. 606	304	185
Statement of points to be relied upon, Case No. 607	310	188

[fols. 1 & 2]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Equity No. 78–351

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

vs.

UNITED STATES OF AMERICA et al.

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court of the United States for the Southern District of New York:

Please prepare a transcript of record in the above entitled cause on appeal to the Supreme Court of the United States, including therein the folliowing:

(1) Amended bill of complaint or petition, which should include Exhibits 1, 2, 3 and 4 which are attached thereto.
(2) Answer of the United States of America.
(3) Answer of Interstate Commerce Commission.
(4) Order to show cause dated September 4, 1934.
(6) Intervening petition of Union Stock Yard and Transit Company of Chicago.
(7) Order granting to Union Stock Yard and Transit Company of Chicago leave to intervene.
(8) Intervening petition of Hygrade Food Products Corporation.
(9) Order granting to Hygrade Food Products Corporation leave to intervene.
(10) Answer of Hygrade Food Products Corporation.
(11) Narrative statement of evidence.
(12) Opinion of the District Court.
(13) Final decree of the District Court.
(14) Notice of application for order allowing appeal.
(15) Petition for appeal.

(16) Assignment of errors.

[fol. 3] (17) Statement of basis on which Supreme Court of the United States has jurisdiction to review decree on appeal.

(18) Motion for order staying the order of the Interstate Commerce Commission pending appeal and decision thereon.

(19) Order allowing appeal.

(20) Order staying the order of the Interstate Commerce Commission for thirty days.

(21) Notice served under Paragraph 2 of Rule 12 of the Supreme Court of the United States.

(22) Citation on appeal.

(23) Undertaking or bond on appeal.

(24) Notice of motion for order of severance.

(25) Motion for order of severance.

(26) Order granting severance.

(27) Notice of lodgement in Clerk's office of narrative statement of evidence., to be included in the transcript of record on appeal and of appeals for an order approving said narrative statement of evidence and providing for the certification of origial exhibits to the Supreme Court of the United States.

(28) Order approving the narrative statement of evidence and providing for the certification of original exhibits to the Supreme Court of the United States.

(29) Stipulation with respect to narrative statement of evidence and certification of original exhibits to the Supreme Court of the United States.

(30) Copy of order signed by the Hon. Harlan F. Stone, Justice of the Supreme Court of the United States, staying the order of the Interstate Commerce Commission made on July 2, 1934 during the pendency and until the determination by the Supreme Court of the United States of the appeal herein.

(31) Copy of stay bond.

(32) This præcipe for transcript of record.

Frank H. Towner, Counsel for Petitioners (Appellants).

[fol. 4] Service of the foregoing præcipe and receipt of a copy thereof are hereby admitted and acknowledged upon the dates respectively set opposite our names.

December 15,. 1934.

Elmer B. Collins, for United States of America.

December 15th, 1934.

J. Stanley Payne, for Interstate Commerce Commission.

December 15th, 1934.

Hornblower, Miller, Miller & Boston, for Hygrade Food Products Corporation.

[fol. 5] [File endorsement omitted.]

[fol. 6] In United States District Court for the Southern District of New York

[Title omitted]

Amended Petition—Filed Sept. 4, 1934.

To the Honorable the Judges of the District Court for the Southern District of New York:

Your petitioners, The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company; The Alton Railroad Company; Charles M. Thomson, as trustee of the railways and property of Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction [fol. 6½] Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Milwaukee, St. Paul and Pacific Railroad Company; The Chicago River and Indiana Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees of the railways and property of The Chicago, Rock Island and Pacific Railway Company and The Chicago, Rock Island and Gulf Railway

Company; Chicago Saint Paul, Minneapolis and Omaha Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); Minneapolis, Saint Paul & Sault Ste. Marie Railway Company; The New York Central Railroad Company; The New York, Chicago and Saint Louis Railroad Company; The Pennsylvania Railroad Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers of the railways and property of Wabash Railway Company, bring this action against The United States of America (hereinafter called the "United States") and the Interstate Commerce Commission (hereinafter called the "Commission") for the purpose of enjoining, setting aside, annulling and suspending a certain order of said Commission.

Petitioners respectfully set forth and allege the following facts as constituting their cause of action:

(1) All of the petitioners, except Charles M. Thomson, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers, are duly organized corporations and common carriers by railroad subject to the Interstate Commerce Act and operate lines of railroad in the states [fol. 7] of Illinois, Indiana, Iowa, and elsewhere. The Alton Railroad Company was the purchaser at foreclosure sale of all the railways and properties of The Chicago and Alton Railroad Company, a corporation, which were operated from August 30, 1922, until July 18, 1931, by William W. Wheelock and William G. Bierd, as receivers thereof, and as such purchaser has acquired all the right, title and interest of said railroad company and said receivers in and has succeeded to all their rights, duties and obligations with respect to the subject matter of this suit. Petitioners, Charles M. Thomson, as trustee of the railways and property of Chicago and Eastern Illinois Railway Company; and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees of the railways and property of The Chicago, Rock Island and Pacific Railway Company and The Chicago, Rock Island and Gulf Railway Company, were appointed and qualified as such trustees in proceedings pending in

the United States District Court for the Northern District of Illinois, Eastern Division, under Section 77 of the bankruptcy laws of the United States and are now acting as such trustees of the railways and properties of said companies. Petitioners, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers of the railways and property of Wabash Railway Company, were appointed and qualified as such receivers in proceedings pending in the United States District Court for the Eastern District of Missouri and are now acting as such receivers. Petitioners Charles M. Thomson, Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as such trustees and receivers, also operate lines of railroad in Illinois, Indiana, Iowa and elsewhere, and as such are subject to the Interstate Commerce Act. All of petitioners except The Baltimore and Ohio Chicago Ter-
[fol. 7½] minal Railroad Company, The Chicago River and Indiana Railroad Company, and Chicago Junction Railway, transport live stock in line haul service to and from Chicago. Petitioners The Baltimore and Ohio Chicago Terminal Railroad Company, The Chicago River and Indiana Railroad Company, and Chicago Junction Railway operate lines of railroad in and around Chicago, and perform only switching service on traffic handled by them. The defendant United States is sued pursuant to express authority of the Congress of the United States as provided in an act approved October 22, 1913, known as the "Urgent Deficiency Appropriations Act" (38 Stat. L. 219; Chap. 32, Title 28, Sections 43 to 48, United States Code 1926). The Commission is a commission existing under and by virtue of the Interstate Commerce Act and is specifically charged with the administration and enforcement of the provisions of said act. The order of the Commission complained of relates to transportation and to a matter complained of in a petition filed with the Commission by Hygrade Food Products Corporation and designated on the docket of the Commission as "No. 24375, Hygrade Food Products Corporation v. The Atchison, Topeka and Santa Fe Railway Company, et al.". The said Hygrade Food Products Corporation, upon whose petition said order was made, is a corporation of the State of New York and is a resident of the Southern District of New York.

(2) Since 1865, The Union Stock Yard and Transit Company of Chicago (hereinafter called the "Yards Company") has operated in the City of Chicago a stockyards (hereinafter called the "stockyards"), open to all, to and from which shipments of live stock of all classes and descriptions are made and at which such live stock is fed, watered, weighed and otherwise cared for, and bought and sold. The [fol. 8] stockyards is served directly only by the rails of petitioner, Chicago Junction Railway. All other of your petitioners serve the stockyards with their own power, operating their trains thereto and therefrom over the rails of petitioner, Chicago Junction Railway under contract arrangements. Hygrade Food Products Corporation (hereinafter called the "Hygrade Company") is a corporation engaged in the meat packing business, and for some years has owned and operated a packing plant immediately north of the stockyards, at which plant said Hygrade Company receives and slaughters all kinds of live stock, and thereafter packs and ships the products thereof.

(3) Since the Yards Company started the operation of the stockyards, there have been located immediately adjacent to the stockyards the plants of numerous companies engaged in the meat packing business, including the plants of the largest of such companies operating in the United States. All of such plants, including that of the Hygrade Company have for many years secured a large part of the livestock required by them from commission men engaged in buying and selling such live stock in the stockyards. In addition, all or some of such plants, including that of the Hygrade Company, have for many years purchased live stock in Illinois, Iowa and other states, which live stock has been shipped to such purchasers at Chicago over the railroads of your petitioners, and delivered to such purchasers through the stockyards. The location of such packing plants adjacent to the stockyards has been for the sole purpose of serving the convenience of the packing companies owning such plants, since it enables them, with a minimum of expense and trouble, to purchase at the stockyards and thereafter have delivered to such plants the live stock necessary in the operation of their business.

[fol. 9] (4) Because of the location of meat packing plants at the stockyards, almost all of the shipments of live stock

to and from Chicago move to and from consignees and shippers at the stockyards. The stockyards now covers a large area, completely covered by buildings, streets, pens, platforms, scales and other facilities necessary in the general handling of live stock, all of great value; and the Yards Company now handles, and for some years has handled, a larger volume of live stock than any other stockyards company in the world.

(5) Ever since it began business, the Yards Company has had in effect certain charges designated as "yardage charges," which it assesses and collects on all live stock bought or sold at the stockyards or handled by the Yards Company or upon its property, said charges constituting the compensation of the Yards Company for services performed by it or for the use of its property. At all times said charges have been charged against the live stock handled in the stockyards and have been collected by the Yards Company from the consignees of said live stock. Said charges have never been billed against or paid by petitioners, nor have petitioners ever received any of said charges, they being made for services rendered and facilities furnished by the Yards Company after the live stock has been placed in suitable unloading pens at the stockyards. Since the effective date of the Packers and Stockyards Act, 1921, the stockyards has been a public stockyards under the provisions of said act, and said yardage charges have been published by the Yards Company in tariffs on file with the Secretary of Agriculture, as required by said act.

(6) Each of the petitioners engaged in the line haul transportation of live stock maintains upon its rails in the Chicago switching district suitable and adequate facilities at [fol. 10] which shippers and consignees of live stock may ship and receive such live stock without payment additional to the line haul rate on such live stock, and the tariffs on each such petitioner, on file with the Commission, list such facilities as points at which such service will be furnished. Other tariffs of said petitioners, on file with the Commission, provide that on the transportation of live stock to or from industries, chutes and sidings of the Yards Company at the stockyards, the Chicago rates will apply, plus $2.70 per car in the case of petitioners operating west of Chi-

cago and $1.35 per car in the case of petitioners operating east of Chicago; also that on shipments of live stock to or from such points at the stockyards such petitioners will pay $1 per car to the Yards Company for unloading such shipments from cars into suitable pens or for loading such shipments from such pens into cars.

(7) In case of shipments to consignees at the stockyards, petitioners other than Chicago Junction Railway, The Chicago River and Indiana Railroad Company, and The Baltimore and Ohio Chicago Terminal Railroad Company, haul such shipments with their own power over the line of petitioner Chicago Junction Railway, and place them at the unloading platforms owned by the Yards Company. The Yards Company then unloads such shipments into suitable unloading pens or chutes owned by it and for this service is paid $1 per car by the carrier hauling the shipment to the unloading platform. Such shipments are then delivered by the Yards Company to the consignees, either at the unloading pens or chutes immediately after unloading or subsequently at other of its pens. In either case, the Yards Company collects its yardage charges on each of such shipments from the consignee thereof, it always having been and [fol. 11] now being impossible for petitioners to deliver live stock to consignees at the stockyards without there being a use of the services and facilities of the Yards Company by such live stock after it has been placed in the unloading pens or chutes of the Yards Company. Such charges are made under tariffs of the Yards Company on file with the Secretary of Agriculture, and no petitioner receives any part of such charges.

(8) On March 23, 1931, the Hygrade Company filed with the Commission a complaint naming your petitioners, the Stockyards Company, and numerous other transportation and stockyards companies as defendants. Such complaint alleged among other things that on each shipment of live stock consigned and delivered to the Hygrade Company at the stockyards, the Yards Company collected from the Hygrade Company the yardage charges hereinbefore referred to; that such yardage charges were not covered by any tariffs filed by the defendants named with the Commission in accordance with the Interstate Commerce Act; that for such charges the defendants named rendered no service ad-

ditional to that necessary in making delivery of such live-stock under paragraph (5) of Section 15 of the Interstate Commerce Act; that said charges covered a portion of the interstate transportation of such shipments, and not being filed with the Commission could not be lawfully collected. Subsequently, the Hygrade Company amended its said complaint, alleging, among other things, that the defendants named had constituted the stockyards their depot for the receipt and delivery of live stock; that the practice whereby the Yards Company imposed such yardage charges upon the Hygrade Company violated the law. Said complaint was designated on the docket of the Commission as "No. 24375, Hygrade Food Products Corporation v. Atchison, [fol. 12] Topeka & Santa Fe Railway Company, et al.," a copy thereof and of the amendment thereto being attached hereto, marked Exhibits 1 and 2.

(9) Petitioners filed answers to said complaint and thereafter, upon due notice, a hearing was had before the Commission in said cause, evidence was introduced by the Hygrade Company and the defendants therein, including petitioners, briefs were filed with the Commission and the cause submitted to it for decision. On July 25, 1933, said Commission made its report in said cause, six of its members, constituting a majority, finding that live stock in carloads, consigned to the Hygrade Company at the stockyards, was not and is not subject to yardage charges in instances where delivery is or was taken at the unloading pens and awarding to the Hygrade Company reparation for such charges paid by it in the past. Five members of the Commission dissented from this decision of the majority, holding that the obligations of petitioners, as common carriers of live stock, terminated under the law when such live stock was delivered by petitioners into suitable unloading pens at the stockyards; that if the Hygrade Company had any complaint against the yardage charges assessed upon its shipments by the Yards Company, complaint against such charges should be filed with the Secretary of Agriculture, and recommending that the complaint should be dismissed. A copy of said report is attached hereto, marked Exhibit 3.

(10) Thereafter, on July 2, 1934, the Commission made an order denying a petition for reargument previously filed

on behalf of petitioners and requiring that petitioners and the other defendants named in the complaint filed by the Hygrade Company cease and desist, on or before September 20, 1934, and thereafter abstain from the practices de-
[fol. 13] scribed in its report of July 25, 1933, which it was held subjected the Hygrade Company to the payment of said yardage charges in instances where delivery is taken at the unloading pens provided for such purposes. Said order further provided that the proceeding before the Commission should be reopened for further hearing to determine the amount of reparation which might be due the Hygrade Company under the findings made by the Commission. A copy of said order is attached hereto, marked Exhibit 4.

(11) Petitioners allege that the report and order of the Commission made in the proceedings before it are so vague, indefinite and uncertain as to make said order invalid. In making said report and order the Commission did not determine the propriety of the collection by the Yards Company of its yardage charges on live stock, in carloads, consigned to the Hygrade Company at the stockyards, in instances where delivery of such live stock is taken at the unloading pens provided for such purposes, nor its right to make such collection; did not determine whether or not said yardage charges were subject to the jurisdiction of the Commission; did not determine whether or not the services for which said charges were collected were a part of interstate transportation; did not determine at what point nor under what circumstances the interstate transportation of live stock to the stockyards terminated; did not say whether the Yards Company should cancel its tariffs on file with the Secretary of Agriculture and cease collecting said charges, or whether it might continue to collect said charges under said tariffs, making collection thereof from the railroads; and did not, in condemning to some extent the collection of such yards charges from the Hygrade Company on live
[fol. 14] stock, in carloads, consigned to the Hygrade Company at the stockyards, determine and state definitely under what conditions such charges might be collected and under what conditions such charges might not be collected. Petitioners allege, therefore, that it is impossible for them to determine definitely what they should do in order to comply with said report and order and that by reason thereof

said order of July 2, 1934 is unreasonable, arbitrary, unlawful and void.

(12) Petitioners further allege that said order of July 2, 1934, purports to apply to all live stock in carloads, consigned to the Hygrade Company at the stockyards, in instances where delivery of such live stock is taken at the unloading pens provided for such purposes, whether such live stock has moved in interstate or intrastate commerce; that such live stock moving in intrastate commerce is not subject to the Act to Regulate Commerce nor to the jurisdiction of the Commission; that said order is, therefore, beyond the power and authority of the Commission and is unreasonable, arbitrary, unlawful and void.

(13) Petitioners further allege that if by said report and order the Commission intended to and did hold, as a matter of law, that the interstate transportation of live stock in carload lots, consigned to the Hygrade Company at the stockyards, does not terminate when such live stock is placed in suitable pens at the stockyards, then the Commission erred in law, and that its said order entered on July 2, 1934, is unreasonable, arbitrary and void.

(14) Petitioners further allege that under Section 15 (5) of the Interstate Commerce Act, transportation of ordinary live stock consigned to the stockyards does not include the [fol. 15] rendering of any service or the furnishing of any facility beyond the placing of such live stock in suitable unloading pens; that by said statute petitioners have no transportation duty or liability beyond such suitable unloading pens; that none of petitioners are under any transportation duty to furnish holding pens or driveways necessary in the removal of such live stock from the stockyards to public highways or to premises of the consignees of such live stock; that if by said report and order the Commission intended to and did hold that petitioners should, as a part of transportation to the stockyards, furnish holding pens and driveways for the use of consignees in addition to suitable unloading pens, without charge, it extends the duty and liability of petitioners in violation of said Section 15 (5), and therefore said order of July 2, 1934 is unlawful, being beyond the power of the Commission to make or enforce, and is void.

(15) Petitioners further allege that said order of July 2, 1934 is in any case unreasonable, arbitrary, unlawful and void for the reason that the Yards Company is not now and was not, at the time of the entry of said order, or at any time mentioned in the complaint filed with the Commission by the Hygrade Company, a common carrier engaged in interstate commerce subject to the Interstate Commerce Act or the jurisdiction of the Commission; that there is no law and no evidence in the record of the proceedings before the Commission which justifies a holding that the Yards Company is subject to said act and the jurisdiction of the Commission; that said order is, therefore, beyond the power and jurisdiction of the Commission to make or enforce and is void.

[fol. 16] (16) Petitioners further allege that if by said report and order the Commission intended to and did hold that petitioners should pay to the Yards Company said yardage charges on live stock in carloads, consigned to the Hygrade Company at the stockyards, in instances where delivery is taken of such live stock at the unloading pens provided for such purposes, then said order of July 2, 1934, is unreasonable, arbitrary, unlawful and void, in that it will require the payment by petitioners of charges for services performed by the Yards Company, over which charges and services petitioners have no jurisdiction or control and which services are performed after the transportation of such live stock by each of petitioners has terminated; that the Commission has no jurisdiction to make such a requirement; that for any such expenditure, petitioners would receive nothing; that there is no law and no evidence in the record of the proceedings before the Commission which justifies such a requirement and that if said order is given such effect, it will operate to confiscate the property of petitioners and deprive them of their property without due process of law and without compensation, in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

(17) Petitioners further allege that if by said report and order the Commission intended to and did hold that petitioners should pay to the Yards Company its yardage charges on live stock, in carloads, consigned to the Hygrade

Company at the stockyards, in instances where delivery of such live stock is taken at the unloading pens provided for such purposes, then said order of July 2, 1934, is unreasonable, arbitrary, unlawful and void in that it will require the interstate and intrastate transportation of such live stock [fol. 17] by petitioners at a lower rate of freight than has heretofore been paid to and received by petitioners for such transportation, as provided in their tariffs on file with the Commission; that in the record of the proceedings before the Commission there is no evidence which justifies such a requirement and that it is, therefore, beyond the power and jurisdiction of the Commission; that if said order is given such effect, it will operate to confiscate the property of petitioners and deprive them of their property without due process of law, in violation of the provisions of the Fifth Amendment to the Constituiton of the United States.

(18) Petitioners further allege that if by said report and order the Commission intended to and did hold that petitioners should pay to the Yards Company its yardage charges on shipments of live stock, in carloads, consigned to the Hygrade Company at the stockyards, in instances where delivery of such live stock is taken at the unloading pens provided for such purposes, then said order of July 2, 1934, is unreasonable, arbitrary, unlawful and void, in that it will require the payment by petitioners of charges for services not subject to the Interstate Commerce Act and not within the jurisdiction of the Commission, said yardage charges being subject only to the jurisdiction of the Secretary of Agriculture; that such a requirement is beyond the power and jurisdiction of the Commission and that it is not justified by any law or by any evidence in the record of the proceedings before the Commission; that for any payments so made by petitioners they will receive nothing and that if said order is given such effect, it will operate to confiscate the property of petitioners and deprive them of their property without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

[fol. 18] (19) Petitioners further allege that if by said report and order the Commission intended to and did hold that the transportation of live stock in carload lots, con-

signed to the Hygrade Company at the stockyards, did not terminate when such live stock was placed in suitable pens at the stockyards, then the Commission erred in law and that its said order entered on July 2, 1934, is unreasonable, arbitrary, unlawful and void, in that it will impose upon petitioners transportation burdens not incident to their engagement, and will require them to furnish, without compensation, at a station not on the lines of railroad operated by them, services and facilities which the law does not require them to so furnish; that there is no law and no evidence in the record of the proceedings before the Commission justifying such a requirement, and that said order, if given such effect, will operate to confiscate the property of petitoners and deprive them of their property without due process of law and without compensation, in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

(20) Petitioners further allege that the said order of the Commission becomes effective on or before September 20, 1934, and that by that date, petitioners are required to cease and desist from the practices described in the Commission's report and which subject the Hygrade Company to the payment of yardage charges on live stock in carloads consigned to it at the stockyards, in instances where delivery of such live stock is taken at the unloading pens provided for such purposes. By paragraph (17) of Section 1 of the Interstate Commerce Act, heavy pecuniary penalties are imposed upon any carrier, as well as its officers, agents and employees, who refuse or fail to obey any such [fol. 19] order of the Commission as that entered by it as hereinbefore alleged, on July 2, 1934; to wit, a forfeiture to the United States of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense.

(21) Petitioners further allege that as hereinbefore set out, said order of July 2, 1934, is so vague, indefinite and uncertain that they cannot determine what they should do in order to comply therewith; but that any action taken by them, in attempted compliance with the requirements of said order, will deprive them and each of them of large amounts which they will be required to expend; that in the event of their making such expenditures, petitioners will be unable to recover the same said order is hereafter set

aside, suspended and annulled and the enforcement thereof enjoined; and that, therefore, unless it be suspended or set aside by order of this court, each of petitioners will be irreparably damaged.

Wherefore, petitioners pray:

(1) That the United States and the Commission be made parties defendant to this petition, and that subpoenas in chancery issue out of and under the seal of this Honorable Court, directed to said defendants as required by law, and that due and proper service of such process and of this petition be forthwith made by fixing a copy thereof in the office of the Secretary of the Commission and another copy in the Department of Justice as provided by law, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpoenas or notices to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

[fol. 20] (2) That a temporary or interlocutory injunction be entered herein, restraining, enjoining and suspending, until the further order of this court, the effect and enforcement of said order of the Commission.

(3) That after final hearing, this court adjudge, order and decree that said order of the Commission has at all times been beyond the lawful authority of the Commission, and that it be perpetually set aside, suspended and annulled and the enforcement thereof perpetually enjoined.

(4) That petitioners and each of them may have such other and further relief in the premises as in equity and justice they are entitled to receive, and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

And as in duty bound, petitioners will ever pray, etc.

Silas H. Strawn, Ralph M. Shaw, E. A. Boyd, P. F. Gault, Walter McFarland, J. N. Davis, Wallace Hughes, D. P. Connell, James Stillwell, L. H. Strasser, Frank H. Towner, Solicitors for Petitioners.

[fol. 21] *Duly sworn to by J. A. Behrle. Jurat omitted in printing.*

[fol. 22] EXHIBIT 1 TO AMENDED PETITION

Before the Interstate Commerce Commission

HYGRADE FOOD PRODUCTS CORPORATION, Complaint,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
The Baltimore and Ohio Railroad Company,
The Baltimore and Ohio Chicago Terminal Railroad Company,
Canadian National Railway Company,
Canadian National Railways,
Canadian Pacific Railway Company,
Cedar Rapids and Iowa City Railway,
The Chesapeake and Ohio Railway Company,
The Chicago and Alton Railroad Company (William W. Wheelock and William G. Bierd, Receivers),
Chicago and Eastern Illinois Railway Company,
Chicago and Erie Railroad Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad ompany,
Chicago Great Western Railroad Company,
Chicago, Indianapolis and Louisville Railway Company,
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee),
Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
The Chicago River and Indiana Railroad Company,
The Chicago, Rock Island and Gulf Railway Company,
The Chicago, Rock Island and Pacific Railway Company,
Chicago, Saint Paul, Minneapolis and Omaha Railway Company,
The Cincinnati, New Orleans and Texas Pacific Railway Company,
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee),
Fort Worth and Denver City Railway Company,
Gulf Colorado and Santa Fe Railway Company,
Gulf Colorado and Santa Fe Railway Company,
Illinois Central Railroad Company,
Kansas City Terminal Railway Company,

Kansas, Oklahoma & Gulf Railway Company,
Kentucky & Indiana Terminal Railroad Company,
Louisville and Nashville Railroad Company,
The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee),
Midland Valley Railroad Company,
[fol. 23] Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
Missouri-Kansas-Texas Railroad Company,
Missouri-Kansas-Texas Railroad Company of Texas,
Missouri Pacific Railroad Company,
Mobile and Ohio Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
Northern Pacific Railway Company,
Panhandle and Santa Fe Railway Company,
The Pennsylvania Railroad Company,
The St. Joseph and Grand Island Railway Company,
St. Paul Bridge & Terminal Railway Company,
Southern Railway Company,
Union Pacific Railroad Company,
The Union Stock Yard and Transit Company of Chicago,
Union Stock Yards Company of Omaha, Limited,
Union Terminal Railway Company (of St. Joseph, Mo.),
Wabash Railway Company,
The Wichita Valley Railway Company, Defendants.

Complaint

The complaint of the above named complainant respectfully shows:

I

That the Hygrade Food Products Corporation, complainant, is a corporation organized under the laws of the State of New York, with its principal office at New York City, New York; that it is engaged in the meat packing business, and that it operates packing houses, among other points, at Chicago, Illinois, and that its packing house at Chicago, Illinois, is an industry located on the Chicago Junction Railway in the State Line district at the substation Union Stock Yards, Illinois.

II

That the defendants above named are common carriers engaged in the transportation of live stock between the points of origin and point of destination hereinafter mentioned, and as such common carriers are engaged in interstate commerce and subject to the provisions of the Interstate Commerce Act.

[fol. 24] That the defendant, The Union Stock Yard and Transit Company of Chicago, is a corporation operating a public stock yards at Chicago, Illinois sub-station Union Stock Yards, Illinois, which is also operated as a depot of the other defendants herein for the receipt and delivery of live stock at that station. That the delivery of live stock to persons or corporations at Chicago, Illinois, sub-station Union Stock Yards, Illinois, is accomplished through the sidings, chutes and pens of the Union Stock Yard and Transit Company, and that in accomplishing said deliveries the said Union Stock Yard and Transit Company is the agent of the railroad defendants hereinabove named, and that for the delivery by the Union Stock Yard and Transit Company of the live stock consigned direct to persons or corporations at Chicago, Illinois, sub-station Union Stock Yards, Illinois, an additional charge over and above the rates named in tariffs lawfully on file with your Commission is assessed in amounts hereinafter described.

III

That the complainant, in the course of its business, purchases live stock, i. e., cattle, calves, hogs and sheep, at numerous points located in the states of Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas and Wisconsin, and that the live stock so purchased by complainant is then shipped by it and for its account, in carloads, over the lines of one or more of the defendants hereinabove named to said complainant at Chicago, Illinois, sub-station Union Stock Yards, Illinois.

IV

That the complainant has paid, and is paying, for the transportation of live stock transported as aforesaid the

line-haul rates lawfully on file with the Commission according to the various tariffs of the line-haul carriers participating therein, and in addition pays $2.70 or $1.35 per car pursuant to Agent Galligan's Tariff 20-S, I. C. C. No. 182, and preceding issues thereof.

[fol. 25]

V

That complainant is taking, and has taken, the delivery of the livestock so transported at pens of the Union Stock Yard and Transit Company, an industry on the Chicago Junction Railway at Chicago, Illinois, the sub-station being Union Stock Yards, Illinois; that in respect to numerous carload shipments of live stock heretofore made complainant has directed that delivery be made to it at its own siding and chutes, but that the defendant carriers hereinbefore named have refused to make such delivery and have insisted that complainant take delivery of its live stock through the chutes and pens of the Union Stock Yard and Transit Company. That this action has been taken by the defendant carriers despite the fact that, under the provisions of Agent Galligan's Tariff 20-S, I. C. C. 182, the line-haul rates plus the aforesaid additional charge of $2.70 or $1.35 per car are applicable from the various points of origin from which said live stock is and has been shipped to complainant's siding.

VI

That on all live stock which complainant has shipped to itself at Chicago, the complainant has paid to the Union Stock Yard and Transit Company, with delivery taken as aforesaid, charges of 35 cents per head on cattle, 25 cents per head on calves, 12 cents per head on hogs, and 8 cents per head on sheep, this in addition to the line-haul rates plus $2.70 or $1.35 per car. That for these charges neither the defendant carriers nor the Union Stock Yard and Transit Company rendered any service over and above the services necessary in making delivery to complainant of its shipments of live stock as required by Section 15(5) of the Interstate Commerce Act.

VII

The charges per head, recited in the foregoing paragraph, are denominated "yardage charges" and purport to cover

services rendered after transportation has been completed. In fact, however, as applied to complainant's shipments, transportation is not completed until said live stock is de-
[fol. 26] livered to complainant and placed in its control, and consequently said charges cover a portion of the interstate transportation services rendered. Such charges, however, are not carried in any tariff on file with your Commission and are consequently being collected without tariff authority.

That the collection on complainant's traffic of charges for making delivery of its live stock in addition to the line-haul charges plus $2.70 or $1.35 per car is unjust and unreasonable in violation of Section 1 of the Act.

VIII

That the defendants make no charges in addition to the line-haul rate plus $2.70 or $1.35 per car for delivering live stock on the siding of the Omaha Packing Company, located at Chicago, Illinois. Furthermore, the defendants, in so far as they serve:

The Bourbon Stock Yard Company, Louisville, Ky.

The LaFayette Union Stock Yards Company, LaFayette, Indiana,

make no additional charge over the line-haul rates lawfully on file with your Commission for delivering direct shipments of live stock to packing houses, competitors of the complainant, located at the points just named.

IX

That, by reason of the facts just recited, complainant and its traffic are unduly prejudiced, and complainant's competitors and their traffic, on which no additional charge is assessed, are unduly preferred.

X

That complainant has been damaged by the circumstances hereinabove recited to the extent that the charges assessed on live stock shipped to it at Chicago, Illinois, exceed, or have exceeded, the line haul rates plus $2.70 or $1.35 per car. Complainant has been further damaged by the refusal of the defendants herein to deliver live stock to it at its own

siding, by reason of the additional expense incurred in driv-
[fol. 27] ing live stock from the pens of the Union Stock Yard and Transit Company to complainant's own pens at its plant.

XI

That, by reason of the facts stated in the foregoing paragraphs, complainant is and has been subjected to the payment of rates and charges for transportation which, when exacted were, and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act; unduly preferential and prejudicial in violation of Section 3 thereof; in so far as collected without tariff authority, in violation of Section 6 thereof; and in violation of Section 15 thereof; and that complainant has been injured thereby in the past and will continue to be injured so long as the situation of which complaint is here made continues.

Wherefore complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of live stock here involved, such other rates as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged such sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Hygrade Food Products Corporation, by A. W. Cushman, Vice-president.

Dated at Chicago, Illinois, March 17, 1931.

[fol. 28] EXHIBIT 2 TO AMENDED PETITION

Before the Interstate Commerce Commission

Docket No. 24375

HYGRADE FOOD PRODUCTS CORPORATION, Complainant,

against

THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, et al., Defendants

Motion to Amend Complaint

Now comes Hygrade Food Products Corporation, the complainant in the above entitled proceeding, and respectfully makes its motion herein to amend its complaint in the following particulars, to wit:

1. By adding a new paragraph to be inserted after paragraph VII on page 5 of said complaint, to read as follows:

VII-A

That said defendants or some of them have alleged or claimed that the proper rate to apply to shipments of live stock from points outside the Chicago district to be delivered at complainant's own siding in said city is "the Chicago rate plus the Chicago Junction switching charge, which is 2¢ per cwt. with a minimum of 60,000 pounds". The complainant does not concede that this is the proper or applicable rate but alleges that if said combination of the Chicago rate plus the Chicago Junction switching charge were applicable to shipments of live stock made and [fol. 29] delivered as aforesaid, said combination of rates is, and for the future would be, unjust and unreasonable in violation of Section 1 of the Act to the extent that said combination exceeds or would exceed the line-haul rate to Chicago plus $2.70 or $1.35 per car.

2. By adding two new paragraphs to be inserted after paragraph IX on page 6 of said complaint, to read as follows:

IX-A

That irrespective of the amount or character of said yardage charges and irrespective of the failure of the de-

fendants to file with the Commission tariffs showing the amount and the fact of imposition of said yardage charges, the practice of said defendants in making the stock yards of the defendant The Union Stock Yard & Transit Company of Chicago their depot for the receipt and delivery of live stock at Union Stock Yards, Illinois, and in making or causing to be made deliveries of live stock at said depot pursuant to an arrangement wherein and whereby said The Union Stock Yards & Transit Company of Chicago may and does impose said yardage charges upon complainants is unjust and unreasonable in violation of Section 1 of the Act.

IX-B

That irrespective of the amount or character of said yardage charges and irrespective of the failure of the defendants to file with the Commission tariffs showing the amount and the fact of imposition of said yardage charges, the practice of said defendants in making no charge in addition to the line-haul rate, plus $2.70 or $1.35 per car, for delivering live stock in car loads on the siding of the Omaha Packing Company located at Chicago, Illinois, while at the same time requiring the complainant to take delivery of its live stock at the stock yards of the defendant, The Union Stock Yard & Transit Company of Chicago, subject to payment of said line-haul rate, plus $2.70 or $1.35 per [fol. 30] car, pursuant to an arrangement wherein and whereby said The Union Stock Yard & Transit Company of Chicago may and does impose said yardage charges, upon complainant (or in the alternative requiring complainant to pay the line haul rate, plus the Chicago Junction switching charge for delivering at complainant's siding), is unduly prejudicial to complainant and its traffic and unduly preferential to said Omaha Packing Company and its traffic in violation of Section 3 of the Act and is unjustly discriminatory under Section 2 of the Act.

3. By striking out paragraph XI of the complaint as now constituted and substituting therefor the following:

That, by reason of the facts stated in the foregoing paragraphs, complainant is and has been subjected to the payment of rates and charges for transportation which, when exacted, were, and still are, unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act; un-

justly discriminatory in violation of Section 2 thereof; unduly preferential and prejudicial in violation of Section 3 thereof; in so far as collected without tariff authority, in violation of Section 6 thereof; and in violation of Section 15 thereof; and the complainant has been injured thereby in the past and will continue to be injured so long as the situation of which complaint is here made continues.

Respectfully submitted, Hygrade Food Products Corporation, by Cyril J. Curran, Its Attorney, Office & P. O. Address: 23rd Floor, 15 Broad Street, New York, N. Y. Hornblower, Miller, Miller & Boston, Of Counsel, 23rd Floor, 15 Broad Street, New York, N. Y.

Dated, New York, N. Y., November 2, 1931.

[fol. 31] EXHIBIT 3 TO AMENDED PETITION

18910

Interstate Commerce Commission

No. 24375

(Submitted January 25, 1933. Decided July 25, 1933)

HYGRADE FOOD PRODUCTS CORPORATION

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

1. Livestock, in carloads, consigned to complainant at the Union Stock Yards, Chicago, Ill., found not subject to yardage charges in instances where delivery was or is taken at the unloading pens. Reparation awarded.

2. Switching charge applicable to the placement for delivery of carloads of live stock at complainant's plant at Chicago not shown to be unreasonable or otherwise unlawful.

Cyril J. Curran for complainant.

J. N. Davis, D. P. Connell, P. F. Gault, Walter McFarland, E. Rigg, R. G. Raasch, Frank H. Towner, and Luther M. Walter for defendants.

Paul E. Blanchard, Ross Dean Rynder, and William N. Strack for interveners.

Report of the Commission

By the Commission:

Exceptions were filed by complainant and defendants to the report proposed by the examiner, and the case was orally argued. Our conclusions differ somewhat from those recommended by him.

[fol. 32] Complainant, a corporation, has a packing house on the rails of the Chicago Junction Railway near the public stockyards known as the Union Stock Yards at Chicago, Ill. By complaint filed March 19, 1931, as amended, it is alleged that for the delivery of carloads of livestock at these public yards certain yardage charges assessed in addition to the rates named in tariffs on file with us were and are inapplicable, that the imposition of these charges was and is unreasonable, that switching charges demanded for the placement of car loads of live stock at complainant's plant are inapplicable and if applicable are unreasonable, and that these charges were and are unjustly discriminatory, unduly prejudicial to complainant, and unduly preferential of the Omaha Packing Company, in Chicago, a competitor of complainant. Reparation and a lawful adjustment for the future are sought. The Omaha Packing Company intervened. Armour and Company intervened in support of the complaint. The term livestock as used herein embraces only animals intended for slaughter, such as cattle, hogs, and sheep.

Complainant's plant lies directly north of the unloading pens of the Union Stock Yards which are operated by the Union Stock Yard & Transit Company. There is a connecting subway under a public highway through which livestock are driven from the yards to the plant. Complainant's plant is served only by the rails of the Chicago Junction. No livestock have ever moved by rail to or from the sidings at complainant's plant or to or from rails adjacent thereto. In addition to certain sidings used and needed for other freight, and which complainant does not suggest or offer for receipt of livestock, there are two stub tracks near the western boundary of complainant's plant, now used for car storage, which were constructed about the year 1924. The capacity of each of these stubs is 10 or 12 cars. Com-

plainant proposes the use of one of these stubs for the receipt of livestock. There are now no facilities there for the unloading of livestock and no scales for weighing. Complainant contends that the charges of $2.70 and $1.35 per carload of livestock from the West and East respectively, applicable to deliveries to "industries, chutes or sidings of the Union Stock Yard & Transit Company, at [fol. 33] Union Stock Yards" apply to deliveries at its plant. This contention is without merit. The published switching charge applicable to the placement at complainant's plant of a carload of livestock is $12.

No sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction. The Union Stock Yards are public yards, served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make.

The Omaha Packing Company is an industry local to the rails of the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington. This industry receives no shipments and buys no livestock through or at the Union Stock Yards. All livestock received by it by rail are placed by the Burlington and the actual unloading into pens and the hoof weighing of the animals is assumed by the industry itself. It is a subsidiary of Swift & Company. Swift & Company, the complainant, and all dealers in livestock in Chicago, other than the Omaha Packing Company, receive direct or buy after receipt by others all inbound livestock at the Union Stock Yards.

Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is impractical. No carrier other than the Burlington delivers or places carload shipments of livestock at any private industry. Defendants have refused to provide for the delivery of livestock at complainant's plant at the rates and charges which apply on livestock delivered at the Union Stock Yards or at the plant of the Omaha Packing Company.

Defendants urge that, if plant delivery of livestock were made for this complainant, all other packing industries

similarly situated on the Chicago Junction Railway would be entitled to like services and that if such services were attempted to be rendered generally, confusion and delay would result. While deliveries are made at the plant of [fol. 34] the Omaha Packing Company without the assessment of a switching charge such as applies to deliveries at complainant's plant, there is no indication that transportation services, conditions, and circumstances connected with deliveries at complainant's plant would be substantially similar to those connected with deliveries at the plant of the Omaha Packing Company, and no facts of record lead to the conclusion that charges applicable to such services as may be performed in making deliveries at complainant's plant are unreasonable or that the differences in these charges are not warranted.

Yardage charge per animal are assessed on all shipments of livestock delivered at the Union Stock Yards, and have been assessed since the establishment of the yards. They now are per head of cattle 35 cents, calves 25 cents, hogs 12 cents, and sheep 8 cents, and these are the charges whether or not the animals are weighed. A schedule naming these charges is filed with the Department of Agriculture in purported compliance with the Packers and Stockyards Act, 1921, but has not been filed with us. Complainant contends that these charges are for transportation services and may not be assessed. The fact that certain services come within the term transportation as defined in section 1 of the Interstate Commerce Act, and the fact that charges assessed for such services are not in any schedule on file with us are not of themselves sufficient reasons why no charges may be made therefor. Memphis Freight Bureau v. K. C. S. Ry. Co., 17 I. C. C. 90. Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon section 15, paragraph (5), of the act, which provides that:

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, * * *.

[fol. 35] Under this provision of the act which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock. The fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards. In Covington Stock Yards Co. v. Keith, 139 U. S. 128, decided March 2, 1891, the Supreme Court of the United States said:

So, when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

• • • • • • •

The same principle necessarily applies to the receiving of livestock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported as well as to the necessities of the respective localities in which it is received and delivered. A carrier of livestock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or com-
[fol. 36] ing from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee

of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safety taken into possession.

* * * * * * *

In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city of shippers and consignees of live stock; and if the appellees had been permitted to use them, without extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish.

A charge for the yardage of livestock after consignee has not taken advantage of any reasonable opportunity afforded to obtain prompt delivery is not a violation of any provision of the Interstate Commerce Act. What constitutes a reasonable opportunity may be determined from the circumstances at the particular yards concerned. At the Chicago Stock Yards 14,000,000 animals were unloaded in [fol. 37] 1930. Those yards are the greatest livestock terminal and market in the world. The magnitude of the business done there demands a degree of promptitude in the receipt and removal of animals that is not generally essential. It is indicated that the method of handling livestock at these yards is efficient and generally productive of satisfactory results. Livestock is moved over the rails of the

Chicago Junction to the unloading platforms of the Union Stock Yards by the line-haul crews. These platforms are provided with chutes or inclines connecting them with unloading pens which have capacities sufficient to hold any carload of livestock. The unloading is done by Stock Yards employees at the expense of the rail carriers and the average time of unloading is about 2 minutes to a carload. These unloading pens are not adapted for the prolonged holding of animals, or for their feeding, watering, and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. At the peak of receipts, livestock are removed from the unloading pens at frequent intervals measured in minutes, whereas, toward the last of the deliveries for the day, livestock may remain in the unloading pens for longer periods. Prompt handling is accomplished by the use of two groups of unloading pens. While one trainload of unloaded livestock is being removed from one group, another trainload is placed for unloading into another group. The first group then becomes available for the unloading of a third trainload.

As to about 15 percent of all shipments consigned to complainant it has taken delivery before the animals were placed in holding pens, and in such instances has driven them from the unloading pens over scales and across and through the ways provided by the stockyards company to complainant's pens and plant. It is asserted that such delivery can be taken as to over 90 percent of the shipments and it is not indicated that notice for that purpose is necessary. It does not appear that there is any occasion for placing the animals into holding pens if prompt delivery is desired. There cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock, and the accomplishment of proper delivery to [fol. 38] complainant. Complainant asserts that free delivery immediately upon arrival of livestock would be satisfactory but maintains that it is entitled also to free delivery at holding pens.

The fact that other freight is subject to storage or demurrage charges only after a lapse of considerable time is not a sufficient reason why a similar rule should apply in respect of yardage charges on livestock. After

unloading, livestock requires unusual attention and care such as is not required by other freight.

Defendants point out that the assessment of yardage charges is the established practice at stockyards throughout the United States and has been the practice of the Chicago yards over 60 years. They argue that the purpose of section 15, paragraph 5, of the act was merely to provide for the unloading of animals without extra charge. It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens. It appears that at some of the stockyards such delivery may be obtained without extra charge.

While we found in Strauss & Adler v. New York Central R. Co., 188 I. C. C. 487, that under the provisions of section 15, paragraph (5), of the act and the 28-hour law, unloading en route is required "into properly equipped pens for rest, feed and water" without extra charge, prompt delivery of livestock to complainant at the Union Stock Yards does not require pens so equipped. If placement into such pens is desired, an extra charge therefor is not within the inhibition of section 15 that an extra charge may not be assessed.

We find that the assailed switching charge on carloads of livestock placed for delivery at complainant's plan is not shown to be unreasonable or otherwise unlawful.

We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens.

We further find that complainant paid charges found inapplicable, was damaged thereby in the amount paid, and [fol. 39] is entitled to reparation in that amount with interest. Complainant should comply with rule V of the Rules of Practice.

EASTMAN, Commissioner, concurring in part:

With one exception, I concur in this report as far as it goes, but I do not believe that it goes far enough. My general position in regard to this matter was indicated in my dissenting expression in E. Kahn's Sons Co. v. Baltimore & O. R. Co., 192 I. C. C. 705, 710-711. It does not seem to me that the unloading pens in this instance permit

of reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival, and hence that they are not in all respects "suitable" for delivery within the meaning of section 15 (5) of the Interstate Commerce Act.

The exception referred to above is that I do not believe that the doctrine is sound which was enunciated in Memphis Freight Bureau v. K. C. S. Ry. Co., 17 I. C. C. 90.

LEE, Commissioner, dissenting in part:

With that portion of the finding which deals with the assailed switching charge I am in accord, but I disagree with the conclusion of the majority to the effect that the yardage charges here assailed were inapplicable in instances where delivery was taken at the unloading pens. Shipments consigned to complainant at Union Stockyards are unloaded at the carrier's expense directly into unloading pens which are owned and maintained by the stockyards company. As stated by the majority there can be no reasonable doubt that these pens are suitable for the receipt of livestock and the accomplishment of proper delivery. Section 15 (5) of the Interstate Commerce Act provides, among other things that transportation of ordinary livestock destined to public stockyards shall include delivery into suitable pens without extra charge. As indicated the carriers bear the expense of unloading into these pens and delivery into suitable pens is, therefore, accomplished without extra charge. There is no provision in the act which required the carriers to do more. I am of [fol. 40] the opinion, therefore, that we have no jurisdiction over the imposition of yardage charges on livestock after it has been delivered into the unloading pens at public stockyards. We have so held in two cases. See Southwestern Horse & Mule Asso. v. A., T. & S. F. Ry. Co., 129 I. C. C. 730; E. Kahn's Sons Co. v. Baltimore & O. R. Co., 192 I. C. C. 705. It is true that in the latter case, decided as recently as April 10, 1933, by the entire Commission, consignees could remove their livestock from the stockyards without the payment of any charges other than the line-haul rates. Nevertheless the majority found that transportation of ordinary livestock, in carloads, to public stockyards ended when the animals were unloaded into suitable pens at such yards and that this marked the limit

of our jurisdiction. The suitable pens were the unloading pens. Since we have no jurisdiction beyond the unloading point we have no concern with what occurs thereafter.

Consideration of the provisions of the Packers and Stockyards Act, 1921, strengthens the foregoing view. Under that act the Secretary of Agriculture is given jurisdiction over stockyard services at public stockyards, which services are defined as follows:

> The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock.

When reporting to the House of Representatives the bill which later became the act referred to the chairman of the Committee on Agriculture said, in part:

> This bill proposes to give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith, * * * that is, the Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment * * *. Hence, [fol. 41] it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends: * * *.

This leaves no doubt as to the intention of Congress to avoid conflicting or overlapping jurisdiction on the part of several Government agencies. But let us analyze the result under the majority findings as I understand them. As to livestock which is unloaded into the unloading pens and later placed in the so-called hold pens until such time as complainant is ready to remove them, our jurisdiction extends only up to the time the animals have been unloaded, and the Secretary of Agriculture has jurisdiction beyond that point, but where complainant is at the unloading pen and removes the animals direct therefrom, this Commission

steps in and continues beyond the unloading pen, into the realm of jurisdiction expressly given by the statute to the Secretary of Agriculture. Clearly it was not the intent of Congress to bring about such a situation. In this connection it is worthy of mention that an investigation instituted by the Secretary of Agriculture, and still pending, includes within its scope all of the services performed and charges made by the stockyards company, except the loading and unloading service and charges.

In purported compliance with the Packers and Stockyards Act a schedule of the yardage charges here complained of is on file with the Department of Agriculture, but it has not been filed with us. These charges are collected and retained by the stockyards company, and no portion of such charges is received by the rail carriers, either directly or indirectly. All of the foregoing lends support to the view that although the stockyards company is the agent of the carriers for the purpose of unloading the livestock, at the time the livestock is unloaded into suitable pens, our jurisdiction ends. Why, then, should the carriers be compelled to pay as reparation awarded by us, money which they never received.

The stockyards company began operation in February, 1865, and during the past 50 years no trunk-line railroad company has had any ownership interest in the company or any control over its affairs. At the present time no company engaged in the operation of a railroad has any [fol. 42] interest in the stockyards company. During the time this company has been in operation its business has grown to enormous proportions. Its present facilities enable it to set 350 cars of livestock for unloading at one time. The time required for unloading a car is approximately 2 minutes and the process of unloading is practically continuous. In the year 1930 the stockyards company unloaded 240,501 cars containing more than 14,000,000 animals and loaded out 48,501 cars. This brings me to another point which in my opinion merits consideration, namely, that Congress by the enactment of section 15 (5) in view of the tremendous volume of livestock moving through publiv stockyards, of which it must be presumed to have had knowledge, recognized that transportation to and from such yards had to be treated differently than ordinary freight. Manifestly, to permit every consignee to enter the stock-

yards and remove his shipment direct from the unloading pens would result in endless confusion, and seriously interfere with the successful operation of the stockyards. This principle was recognized by the Commission in connection with the unloading of livestock at Chicago as evidenced by the following language used by the Supreme Court in Adams v. Mills, 286 U. S. 397:

> The commission found that in view of the congested conditions in the Chicago stockyards and the great volume of traffic, it would have been physically impracticable, if not impossible, for the consignees themselves to unload their own shipments.

Does not the same impracticability and impossibility apply in connection with the consignees taking their livestock direct from the unloading pens?

The assessment of yardage charges has been the practice at these stockyards for over 60 years. Certain of the line-haul carriers maintain facilities for unloading livestock at points within the switching limits of Chicago other than the Union Stock Yards. At such points delivery can be taken without the payment of yardage charges. The magnitude of the business done at the Union Stock Yards indicates that shippers prefer to take delivery there even though such delivery necessitates the payment of a yardage charge. In this preference shippers are doubtless in- [fol. 43] fluenced by the superior services available at these yards and the advantages accruing from their proximity to the public markets. Among the many facilities furnished by the stockyards company is an elevated driveway through which complainant's livestock may be and is driven directly to its plant, which is separated from the stockyards by a public street. It is for the use of this and other facilities of the stockyards company that the charges complained of are assessed. In effect the majority conclude that these facilities and the elevated driveway must be furnished by the carriers as a part of the "transportation" which they are required to furnish, which term is defined in section 1 (3) as follows:

> The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities of shipment or carriage, irrespective of

ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The majority say in effect that section 15 (5) in no wise modified section 1 (3). In my opinion the speci c provisions contained in section 15 (5) must be given eff ct over the general provisions contained in section 1 (3). Support for this view is found in the concluding sentence of section 15 (5) reading as follows:

Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

The italicized portion clearly indicates an intention on the part of Congress to modify, and in my opinion it did modify, the services required of the carriers insofar as the duty of performing service on shipments of ordinary livestock to or from public stockyards was concerned. If this was not the case, manifestly the proviso in question is [fol. 44] meaningless. Furthermore, since the term "transportation" in section 1 (3) includes storage, would not the carriers be required (if the majority view is sound) to hold livestock, where complainant was not at the unloading pens, in the so-called hold pens as a part of the transportation service until complainant was ready to receive the same? But the majority holds, and correctly so, that the holding of livestock in such hold pens is not a service of transportation.

As indicated, the line-haul carriers collected nothing in excess of the lawful tariff charges for the service they performed. Transportation over which we have jurisdiction ends when the livestock is unloaded into suitable pens. Admittedly the unloading pens are suitable pens. If complainant is of the view that the charges made for the use of the stockyards' facilities are unreasonable or otherwise improper, its remedy lies not with this Commission but with the Secretary of Agriculture. For these reasons the complaint should be dismissed.

I am authorized to say that Commissioners Meyer, Porter, Mahaffie, and Miller join in this expression.

[fol. 45] EXHIBIT 4 TO AMENDED PETITION

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of July, A. D. 1934.

No. 24375

HYGRADE FOOD PRODUCTS CORPORATION

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

[fol. 46] It appearing, That on July 25, 1933, the Commission made and filed its report in the above-entitled proceeding, wherein it was found, inter alia, that livestock, in carloads, consigned to complainant Hygrade Food Products Corporation at Union Stock Yards, Chicago, Ill., was not subject to yardage charges in instances where delivery was or is taken at the unloading pens, which said report is hereby referred to and made a part hereof:

It further appearing, That on January 11, 1934, complainant filed petition for hearing on the question of the amount of reparation and for order requiring defendants to comply with the Commission's decision herein; that on January 20, 1934, defendants filed answer to complainant's petition and in said answer petitioned for reconsideration and reargument; and that on January 29, 1934, complainant filed its reply to defendants' petition for reconsideration and reargument:

And good cause appearing therefor:

It is ordered, That defendants' petition be, and it is hereby, denied.

It is further ordered, That the above-named defendants be, and they are hereby, notified and required to cease and

desist, on or before September 20, 1934, and thereafter to abstain from the practices described in the aforesaid report which subject complainant to the payment of yardage [fol. 47] charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes.

It is further ordered, That the above-entitled proceeding be, and it is hereby, reopened for further hearing at such time and place as the Commission may hereafter direct for the purpose of determining the amount of reparation due complainant under the findings in this case.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 48] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF UNITED STATES TO AMENDED PETITION—Filed Sept. 28, 1934.

The United States, one of the defendants in the above-entitled cause, for answer to the amended petition filed therein against it, answers and says:

I

United States admits for the purposes of this suit that the facts alleged in the opening paragraph and in paragraphs 1 and 2 of the amended petition are true.

II

Answering paragraphs 3 and 4 of the amended petition, United States says that it has not sufficient knowledge of the matters, things and conclusions therein alleged to enable it either to admit or deny the allegations of said paragraphs, and as to them it neither admits nor denies; but,

United States says that the allegations of said paragraphs, [fol. 49] even if true, are irrelevant and immaterial to any issue which may properly be raised in this suit.

III

United States admits that the facts alleged in paragraph 5 of the amended petition are true, with this exception: It says that it is without sufficient knowledge to enable it either to admit or deny the following allegations of said paragraph:

At all times said charges have been charged against the live stock handled in the stockyards and have been collected by the Yards Company from the consignees of said live stock. Said charges have never been billed against or paid by petitioners; nor have petitioners ever received any of said charges, they being made for services rendered and facilities furnished by the Yards Company after the live stock has been placed in suitable unloading pens at the stockyards,

and as to said allegations United States neither admits or denies.

IV

Answering paragraph 6 of the amended petition, United States denies the allegation that "each of the petitioners engaged in the line haul transportation of live stock maintains upon its rails in the Chicago switching district suitable and adequate facilities at which shippers and consignees of live stock may ship and receive such live stock without payment additional to the line haul rate on such live stock;" admits that some of the line haul petitioners publish and file with the Interstate Commerce Commission tariffs which purport to offer facilities for loading and unloading shipments of live stock at certain points on their respective lines within the Chicago Switching District, but denies that any of the petitioners maintain suitable and adequate facilities for such purposes at the points mentioned in said tariffs or at any other point in the Chicago Switch- [fol. 50] ing District, except at Union Stock Yards; and United States admits the remaining allegations of said paragraph 6.

V

United States admits the truth of the allegations contained in paragraph 7 of the amended petition, with this exception: It denies the allegation therein that,

> • • • it always having been and now being impossible for petitioners to deliver live stock to consignees at the stockyards without there being a use of the services and facilities of the Yards Company by such live stock after it has been placed in the unloading pens or chutes of the Yards Company,

and alleges that petitioners employ the facilities and services of the Yards Company to perform the duties, imposed upon petitioners by law, of unloading and delivering live stock to consignees at said stockyards.

VI

United States admits that the facts alleged in paragraphs 8, 9 and 10 of the amended petition are true; but for a full, complete and accurate statement of the allegations contained in the complaint and amended complaint of the Hygrade Company, mentioned in said paragraph 8, and of the findings, conclusions and statements of the Commission in its report, mentioned in said paragraph 9, and of the requirements of its said order, mentioned in said paragraph 10, United States respectfully refers the Court to the full text on those three documents which are annexed to and made a part of the amended petition herein as Exhibits 1, 2, 3 and 4, respectively.

[fol. 51]

VII

United States denies the allegation of paragraph 11 of the amended petition; denies that the matters, things and conclusions set forth in the second sentence thereof are relevant or material to the question whether said order of the Interstate Commerce Commission is valid and lawful, and says that said sentence contains purely argumentative and superfluous statements.

VIII

United States denies the allegations of paragraph 12 of the amended petition; denies that the Commission's said

order of July 2, 1934, purports to apply to all live stock in carloads consigned to the Hygrade Company at the stockyards and delivered to that Company at the unloading pens provided for such purposes; admits that intrastate shipments of such live stock is not in this case subject to the Interstate Commerce Act; and alleges that said order applies and was and is intended to apply only to interstate shipments of live stock.

IX

United States denies the allegations of paragraphs 13, 14, 15, 16, 17, 18 and 19 of the amended petition, and denies that said order of the Commission is unlawful or void for the reasons therein alleged or for any other reason.

Further answering said paragraphs and particularly paragraphs 15 and 18, United States alleges that transportation of interstate shipments of live stock, including the unloading and delivery thereof to consignees, and all charges, practices and matters connected therewith are subject to the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission, regardless of [fol. 52] whether such unloading and delivery services, or any part thereof, are performed by petitioners themselves, or for them by the Yards Company, and that, therefore, the Commission did not exceed its power and jurisdiction in making and issuing its said order.

X

United States admits the allegations of paragraph 20 of the amended petition with this exception: It denies that the penalties imposed upon petitioners and their officers and agents for refusal or failure to obey the order of the Commission involved in this suit are those provided by paragraph 17 of section 1 of the Interstate Commerce Act, and alleges that the penalties to which peitioners will be subject for refusal or failure to obey said order are those provided by paragraph 8 of section 16 of said Act.

XI

United States denies the allegations of paragraph 21 of the amended petition and particularly denies that compliance by petitioners with or enforcement of said order

against them will cause them irreparable damage or any other legal injury.

XII

Except as herein expressly admitted, United States denies each and every allegation in the amended petition and in the several parts and paragraphs thereof.

Wherefore, having fully answered the amended petition, United States prays that the relief therein prayed be denied and that the amended petition be dismissed with costs to the petitioners, and that United States have the benefit of such other and further orders, decrees, or relief as may [fol. 53] be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. Martin Conboy, United States Attorney. Harold M. Stephens, Assistant Attorney General.

[File endorsement omitted.]

[fol. 54] In United States District Court

[Title omitted]

Answer of Interstate Commerce Commission to Amended Petition—Filed Sept. 12, 1934

The Interstate Commerce Commission, hereinafter called the Commission, defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the amended petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph 1, the Commission admits that the order complained of relates to transportation and to a matter complained of in a petition filed with the Commission by Hygrade Food Products Corporation and designated on the docket of the Commission as No. 24375, Hygrade

Food Products Corporation v. The Atchison, Topeka and Santa Fe Railway Company et al.; that said Hygrade Food Products Corporation is a corporation of the State of New York and is a resident of the Southern District of New York, and that, therefore, the venue of this suit is properly laid in this District.

[fol. 55]

II

Answering paragraph 2, the Commission admits, for the purposes of this suit, that the allegations contained therein are true.

III

Answering paragraphs 3 to 8, both inclusive, the Commission admits that on March 23, 1931, the Hygrade Food Products Corporation filed with it a complaint, dated March 17, 1931, a copy of which is incorporated in the petition as "Exhibit 1," pages 19-24 thereof, and that subsequently said complaint was amended, a copy of which amendment is incorporated in the amended petition as "Exhibit 2," pages 25-27 thereof, and the Commission respectfully refers the court to said complaint and to the amendment thereof for full, complete, and accurate information concerning the contents of same.

IV

Answering paragraph 9, the Commission admits and alleges that it made the report of July 25, 1933, entitled No. 24375, Hygrade Food Products Corporation v. Atchison, Topeka & Santa Fe Railway Company et al., a copy of which is incorporated in the amended petition as "Exhibit 3," pages 28-41 thereof; that said report is published at 195 I. C. C. 553, and the Commission respectfully refers the court to said report for full, complete, and accurate information concerning the contents thereof.

V

Answering paragraph 10, the Commission admits and alleges that it made the order dated July 2, 1934, a copy of which is incorporated in the amended petition as "Exhibit 4," pages 42-43, and the Commission respectfully refers the court to the order itself for full, complete, and accurate information as to the contents thereof.

[fol. 56] VI

Further answering paragraphs 1 to 10, both inclusive, the Commission admits and alleges that said report of July 25, 1933, and said order of July 2, 1934, were made in a proceeding then pending before it entitled No. 24375, Hygrade Food Products Corporation v. Atchison, Topeka and Santa Fe Railway Company et al.; that in said proceeding a large volume of testimony and other evidence bearing upon the matters covered by said report and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioners herein by their counsel; that in said proceeding questions relating to said matters were fully argued, both orally and in briefs, and were submitted to the Commission for determination, whereupon the Commission determined said matters and entered and served upon the parties the aforesaid report and order; that said report and order include the Commission's findings of fact, decisions, conclusions, and requirements, and that upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its said order of July 2, 1934, was and is based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid.

The Commission further alleges that in making said report and order it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the petitioners herein by their counsel, including matters covered by the allegations of the amended petition herein.

[fol. 57] The Commission further alleges that said order was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it, and that in making said order the Commission did not exceed the authority which had been duly conferred upon it or exercise that authority in either an unreasonable or arbitrary manner.

VII.

Answering paragraphs 11 to 21, both inclusive, the Commission denies that said order of July 2, 1934, is either un-

lawful or invalid or void for the reasons set forth in said paragraphs or elsewhere in the petition, or for any other reason.

VIII

Further answering paragraph 12, the Commission alleges that said order applies only to interstate transportation, and denies that said order has or was intended to have any application to shipments of livestock originating at points in Illinois and moving wholly in intrastate transportation within the State of Illinois.

IX

Further answering paragraphs 16, 17, 18, and 19, the Commission denies that said order of July 2, 1934, if permitted to remain in effect, will operate either to confiscate the property of the petitioners, or to deprive them of their property without due process of law and without compensation, in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

X

Further answering paragraph 20, the Commission admits that the effective date of said order of July 2, 1934, is September 20, 1934; and that the Interstate Commerce Act, in paragraph 8 of section 16, provides for the imposition of penalties for disobedience of orders of the Commission such [fol. 58] as the aforesaid order of July 2, 1934.

XII

Further answering paragraph 21, the Commission denies the truth of the allegations therein, and particularly denies that said order of July 2, 1934, will subject petitioners, or any of them, either to irreparable damage or to any legal injury.

XII.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the amended petition in so far as they conflict either with the allegations herein or with either the statements or conclusions of fact included in the aforesaid report and order,

which said report and order are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that the amended petition herein be dismssed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 58½] *Duly sworn to by Patrick J. Farrell. Jurat omitted in printing.*

(File endorsement omitted.)

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed Oct. 31, 1934

Whereas, in the above entitled suit application has been made to the undersigned, a District Judge of the United States for the Southern District of New York for a permanent injunction enjoining, setting aside, suspending and annulling a certain order made by the Interstate Commerce Commission as of the date of July 2, 1934, and

Whereas, an amended verified petition praying for such permanent injunction, enjoining, setting aside, suspending and annulling the enforcement, operation and execution of said order as set forth in said petition has been filed with the Clerk of this Court, and

Whereas, it has been made to appear from said verified petition that the petitioner may be entitled to the permanent injunction prayed for therein, it is

Ordered, that the respondents herein, the United States of America and the Interstate Commerce Commission, appear before the undersigned and two other judges, said judges having then been called by the undersigned to his [fol. 60] assistance to hear and determine said petition in accordance with the provisions of an Act of Congress of October 22, 1913, at the U. S. Court House and Post Office

Building, Room 235, in the Borough of Manhattan, City of New York and State of New York, September 11, 1934, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard and then and there show cause before said Court and judges so convoked or so called together, why the injunction prayed for in said petition should not issue, and it is further

Ordered, that a copy of this order with the petition attached thereto be served upon the Attorney General of the United States and on the Secretary or Chief Counsel of the Interstate Commerce Commission and that notice of this hearing be served upon them at least five days before said September 11, 1934, as by said statute made and provided.

Dated at New York, N. Y., this 4th day of September, 1934.

Alfred C. Coxe, United States District Judge.

[File endorsement omitted.]

[fol. 61] In United States District Court

[Title omitted]

Intervention of Union Stock Yard and Transit Co.—Filed Nov. 1, 1934

Comes now The Union Stock Yard and Transit Company of Chicago by its attorneys, Luther M. Walter, of Chicago, and Charles E. Cotterill, of New York City, and says that it was a party defendant in the proceedings before the Interstate Commerce Commission out of which eventuated the order of such Commission that is involved in the above entitled proceedings; that the order of the Commission is directed to The Union Stock Yard and Transit Company of Chicago along with other named defendants before the Commission; that because of the foregoing it has an interest in these proceedings before this Honorable Court; and that in view of the foreging, under the statutes of Congress, The Union Stock Yard and Transit Company of Chicago is entitled to be a party to these proceedings as of right and so desires. Therefore, such The Union Stock

Yard and Transit Company of Chicago now becomes a [fol. 62] party to these proceedings before this Honorable Court by this intervention and respectfully avers that such order of the Interstate Commerce Commission as so directed to it and if so applied to it is and would be wholly null and void.

The Union Stock Yard and Transit Company of Chicago, by Luther M. Walter, Chas. E. Cotterill, 70 East 45th Street, Its Attorneys.

Dated October 2, 1934.

The foregoing is approved and The Union Stock Yard and Transit Company of Chicago is made a party to the above entitled proceedings.

Jno. C. Knox.

Dated October 2, 1934.

[fol. 63] Service of the above is acknowledged this date of October 2, 1934.

Elmer B. Collins, Attorney for the United States. J. Stanley Payne, Attorneys for the Interstate Commerce Commission. Hornblower, Miller, Miller & Boston, Attorney- for Hygrade Food Products Corporation. F. H. Towner, Attorney for Trunk Line Railroad, Petitioners.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ORDER GRANTING LEAVE TO INTERVENE TO HYGRADE FOOD PRODUCTS CORPORATION—Filed Oct. 31, 1934

To the Honorable the Judges of the District Court of the United States, for the Southern District of New York:

Your petitioner, Hygrade Food Products Corporation, respectfully shows to this Court and alleges:

(1) That your petitioner is a corporation duly organized and existing under the laws of the State of New York.

(2) That the above-entitled suit was commenced on or about August 15, 1934, by the filing in this Court of a petition for the purpose of enjoining, setting aside, annulling and suspending a certain order of the Interstate Commerce Commission entered July 2, 1934, in a proceeding before said Commission designated on the docket of said Commission as "No. 24375, Hygrade Food Products Corporation v. The Atchison, Topeka and Santa Fe Railway Company, et al."

(3) That on or about September 3, 1934, the petitioners in the above-entitled suit filed in this Court an amended petition for the purpose of enjoining, setting aside, annulling, and suspending a certain order of the Interstate Commerce [fol. 65] Commission entered July 2, 1934, in a proceeding before said Commission designated on the docket of said Commission as "No. 24375, Hygrade Food Products Corporation v. The Atchison, Topeka and Santa Fe Railway Company, et al."

(4) That your petitioner was the complainant before said Commission in said docket No. 24375, that said order of July 2, 1934, was issued in favor of your petitioner; that your petitioner is the only party which will be benefited by the enforcement of said order of July 2, 1934, and that your petitioner has an interest in this suit.

Wherefore your petitioner prays that an order be entered herein permitting your petitioner to intervene as a party defendant in this cause with the right to answer the amended petition filed herein as set forth in Exhibit A attached hereto, and to plead further and be heard in all matters arising in this cause, and that your petitioner be entitled to notice of all proceedings herein and that your petitioner have such other and further relief as to this Court may seem just and proper.

Dated New York, N. Y., October 1, 1934.

Hygrade Food Products Corporation, by Samuel Slotkin, President. Hornblower, Miller, Miller & Boston, Solicitors for Petitioner. Nathan L. Miller, Charles A. Boston, Harold J. Gallagher, Of Counsel.

[fol. 66] *Duly sworn to by Samuel Slotkin. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE TO HYGRADE FOOD PRODUCTS CORPORATION—Filed Oct. 31, 1934

This cause came on to be further heard at this term, and thereupon, upon consideration thereof, and upon the subjoined consent of the solicitors for all parties hereto, it was

Ordered, Adjudged and Decreed as follows:

(1) That Hygrade Food Products Corporation be and it hereby is permitted to intervene in this action as a party defendant, and to plead as set forth in Exhibit A attached to its petition filed herein, and to plead further and be heard on all matters arising in this cause.

(2) That all notices of further motions or proceedings in the above entitled cause shall be served upon Messrs. Hornblower, Miller, Miller & Boston, 15 Broad Street, New York City, solicitors for said Hygrade Food Products Corporation, pursuant to the rules and practices of this Court.

Dated: New York, N. Y., October 2, 1934.

Jno C. Knox, United States District Judge for the Southern District of New York.

[fol. 68] The undersigned hereby consent to the entry of the within order.

Frank H. Towner, Solicitor for Petitioners. Elmer B. Collins, Solicitor for Defendant, The United States of America. J. Stanley Payne, Solicitor for Defendant, Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENOR, HYGRADE FOOD PRODUCTS CORPORATION—Filed Oct. 31, 1934

Hygrade Food Products Corporation, intervenor as a party defendant in this cause (hereinafter sometimes called

"Intervenor"), for answer to the amended petition filed herein, answers and says:

(1) Intervenor admits that the facts alleged in paragraph (1) of said amended petition are true.

(2) Answering paragraph (2) of said amended petition, Intervenor denies that all live stock received at the stockyards of The Union Stock Yard & Transit Co. (hereinafter in this answer called the "Yards Company"), is fed, watered, weighed and otherwise cared for and bought and sold; and admits that all the other allegations contained in said paragraph (2) of the amended petition are true.

(3) Answering paragraph (3) of said amended petition, Intervenor admits that it has purchased live stock in Illinois, Iowa and other states, which live stock has been [fol. 70] shipped to Intervenor at Chicago over the railroads of petitioners, and alleges that all the other allegations contained in said paragraph (3) are irrelevant and immaterial to any issue which may properly be raised in this suit and, therefore, neither admits or denies said allegations.

(4) Answering paragraph (4) of said amended petition, Intervenor alleges that the allegations contained in said paragraph (4) are irrelevant and immaterial to any issue which may properly be raised in this suit, and, therefore, neither admits or denies said allegations.

(5) Answering paragraph (5) of said amended petition, Intervenor denies that the stockyards of the Yards Company are exclusively public stockyards subject to the provisions of the Packers and Stockyards Act of 1921; further answering said paragraph (5), Intervenor admits that the Yards Company now imposes, and has imposed during the period referred to in the complaint described in paragraph (1) of the amended petition, certain yardage charges on all live stock handled in the stockyards and that said yardage charges have been collected and are being collected from the consignee of said live stock. Intervenor alleges that it is without knowledge of all the other allegations contained in paragraph (5) of said amended petition and as to them Intervenor neither admits or denies.

(6) Answering paragraph (6) of the amended petition, Intervnor denies the allegation that "each of the petitioners

engaged in the line haul transportation of live stock main-
[fol. 71] tains upon its rails in the Chicago switching district suitable and adequate facilities at which shippers and consignees of live stock may ship and receive such live stock without payment additional to the line haul rate on such live stock;" admits that some of the line haul petitioners publish and file with the Interstate Commerce Commission tariffs which purport to offer facilities for loading and unloading shipments of live stock at certain points on their respective lines within the Chicago Switching District, but denies that any of the petitioners maintain suitable and adequate facilities for such purposes at the points mentioned in said tariffs or at any other point in the Chicago Switching District, except at Union Stock Yards; and Intervenor admits the remaining allegations of said paragraph (6).

(7) Answering paragraph (7) of said amended petition, Intervenor denies the allegation thereof that "it always having been and now being impossible for petitioners to deliver live stock to consignees at the stockyards without there being a use of the services and facilities of the Yards Company by such live stock after it has been placed in the unloading pens or chutes of the Yards Company", and alleges that petitioners employ the facilities and services of the Yards Company to perform the duties imposed upon petitioners by law of unloading and delivering live stock to consignees at said stockyards; Intervenor admits all of the other allegations contained in said paragraph (7) of the amended petition.

[fol. 72] (8) Intervenor admits that the facts alleged in paragraphs (8), (9) and (10) of the amended petition are true; but for a full, complete and accurate statement of the allegations contained in the complaint and amended complaint of the Intervenor, mentioned in said paragraph (8), and of the findings, conclusions and statements of the Commission in its report, mentioned in said paragraph (9), and the requirements of its said order, mentioned in said paragraph (10), Intervenor respectfully refers the Court to the full text on these three documents which are annexed to and made a part of the amended petition herein as Exhibits 1, 2, 3 and 4, respectively.

(9) Intervenor denies the allegations contained in paragraph (11) of the amended petition.

(10) Intervenor denies the allegations of paragraph (12) of the amended petition; denies that the Commission's said order of July 2, 1934, purports to apply to all live stock in carloads consigned to the Hygrade Company at the stockyards and delivered to that Company at the unloading pens provided for such purposes; admits that infrastate shipments of such live stock is not in this case subject to the Interstate Commerce Act; and alleges that said order applies and was and is intended to apply only to interstate shipments of live stock.

(11) Intervenor denies the allegations of paragraphs (13), (14), (15), (16), (17), (18) and (19) of the amended petition, and denies that said order of the Commission is unlawful or void for the reasons therein alleged or for [fol. 73] any other reason.

Further answering said paragraphs and particularly paragraphs (15) and (18), Intervenor alleges that transportation of interstate shipments of live stock, including the unloading and delivery thereof to consignees, and all charges, practices and matters connected therewith are subject to the Interstate Commerce Act and to the jurisdiction of the Interstate Commerce Commission, regardless of whether such unloading and delivery services, or any part thereof, are performed by petitioners themselves, or for them by the Yards Company, and that, therefore, the Commission did not exceed its power and jurisdiction in making and issuing its said order.

(12) Intervenor denies the allegations of paragraphs (20) and (21) of the amended petition.

(13) Except as herein expressly admitted, Intervenor denies each and every allegation in the amended petition and in the several parts and paragraphs thereof.

Wherefore, Intervenor prays that the relief prayed for in said amended petition be denied and that the amended petition be dismissed with costs, and that Intervenor have

the benefit of such other and further orders, decrees, or relief as may be just and proper.

Hygrade Food Products Corporation, by Samuel Slotkin, President. Hornblower, Miller, Miller & Boston, Solicitors for Intervenor. Nathan L. Miller, Harold J. Gallagher, Edward M. Boyne, of Counsel.

[fol. 74] *Duly sworn to by Samuel Slotkin. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 75] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity

No. 78-351

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al., Petitioners,

against

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

Before Martin T. Manton, Circuit Judge; John C. Knox and Henry W. Goddard, District Judges, Composing a Court Convened Pursuant to §380 of the United States Code

This suit is filed pursuant to the provisions of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 28 U. S. C. 41 [28]-48) to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission. Dismissed.

Silas H. Strawn, Esq., Ralph M. Shaw, Esq., E. A. Boyd, Esq., P. F. Gault, Esq., Walter McFarland, Esq., J. N. Davis, Esq., Wallace Hughes, Esq., D. P. Connell, Esq., James Stillwell, Esq., L. H. Strasser, Esq., Frank H. Towner, Esq., Solicitors for Petitioners.

[fol. 76] J. Stanley Payne, Esq., Assistant Chief Counsel, Interstate Commerce Commission; Daniel W. Knowlton, Esq., Chief Counsel, of Counsel. Hornblower, Miller, Miller & Boston, Esqs., Solicitors for Intervenor, Hygrade Food Products Corp.; Nathan L. Miller, Esq., Harold J. Gallagher, Esq., Edward M. Boyne, Esq., of Counsel. Charles E. Cotterill, Esq., Luther M. Walter, Esq., Solicitors for Intervenors, Union Stock Yard and Transit Company of Chicago; Mark W. Potter, Esq., of Counsel.

OPINION—Filed Oct. 30, 1934

MANTON, Circuit Judge:

The suit is brought under the Urgent Deficiencies Appropriation Act to set aside an order of the Interstate Commerce Commission which was made on application of the Hygrade Food Products Corp., an intervenor herein. The complainants were ordered to cease and desist from practices which subjected the Hygrade Food Products Corp. to the payment of yardage charges on live stock consigned to it at the Union Stockyards in Chicago, in instances where delivery is taken at unloading pens provided for such purpose. The order of the Commission does not apply to livestock, delivery of which is taken at holding pens, as distinguished from unloading pens. The intervenor, Hygrade Food Products Corp. operates a packing plant adjacent to the Union Stock Yards and purchases much of its livestock from points outside of Illinois. Shipments of this livestock are carried into the Yards under an arrangement between the Yards Company and the railroads. The cars are placed at unloading platforms of the Yards Company which performs the unloading service for [fol. 77] the railroads at the latter's expense. The animals are taken from the cars into unloading pens, and if the consignees are not there at the time of the unloading, they are removed almost immediately into holding pens where there are facilities for feeding, watering, and otherwise caring for them. If the consignees are present at the time of unloading, they take delivery of the stock at the unloading pens. Whether the consignees take delivery of the livestock at the unloading pens or at the holding pens, they

have been subjected to certain yardage charges made by the Yards Company, and this has been so whether the holding pens service is given to the livestock or otherwise.

The Hygrade Corporation did not object to yardage charges where delivery was taken at the holding pens since actual service was rendered, but has succeeded before the Commission in avoiding such charges where delivery is taken at unloading pens.

The Interstate Commerce Commission found the Yards Company to be a livestock terminal for the line haul carriers bringing livestock to Chicago, and that consignees were entitled under § 15(5) of the Interstate Commerce Act (41 Stat. 456, 484, U. S. C. Title 49) to delivery at pens, suitable for proper delivery, without charge, and that the mere placement therein of live stock constituted no assessable service rendered by the Yards Company.

The decision of the Commission also provides that a charge may rightfully be made by the Yards Company if delivery at the unloading pens is not taken within a reasonable time, which time, due to the peculiar nature of the business, may be but a matter of minutes. The order is directed against the line haul carriers and the Yards Com-
[fol. 78] pany and it is they who ask relief in this suit.

It is argued by the complainants that the Commission was without jurisdiction to make the order but the Commission has answered that Secs. 1(6) and 15(1) of the Interstate Commerce Act (41 Stat. 456, U. S. Code, Title 49) vest jurisdiction in it. Sec. 1(6) declares that all common carriers subject to its provisions shall "establish, observe and enforce * * * just and reasonable * * * practices affecting rates * * * the manner and method of * * * delivering property for transportation * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property * * * and every unjust and unreasonable * * * practice is prohibited." Sec. 15(1) provides for the enforcement of the provisions of § 1(6) and that if after a full hearing, the Interstate Commerce Commission believes any practice to be unjust or unreasonable, it shall order the carrier or carriers to cease violations thereof and conform to a practice prescribed by the Interstate Commerce Commission as just and reasonable. Matters concerning rates may constitute an unjust practice. Adams v. Mills, 286 U. S. 397.

It is also said that the order is uncertain and indefinite and therefore void because (a) it does not state what is a reasonable time within which the intervenor must accept delivery in order to be relieved of the payment of the yardage charges; (b) it does not state whether the Yards Company is or is not a common carrier, and (c) it does not state what shall become of the yardage charges after the complainants and the Yards Company are required to cease [fol. 79] the practice whereby they have imposed such charges upon the Hygrade Corporation. Also, it is argued, that the order attacked herein was not made in a practice case, as so treated by the Commission, but a rate case, and that the order of the Commission is therefore void in that it does not determine that the present rates on live stock carriage are adequate to enable the complainants to absorb the yardage charges of the Yards Company.

Lawful yardage charges, such as those involved in keeping the animals in holding pens, may well be a matter under the jurisdiction of the Secretary of Agriculture by virtue of the Packers and Stockyards Act (42 Stat. 159, U. S. C. Title 7), and not under the cognizance of the Interstate Commerce Commission. But § 226 of the Packers Act states that "nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission nor confer on the Secretary (of Agriculture) concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." It is thus apparent that if the jurisdiction of the Interstate Commerce Commission is established, jurisdiction of the Secretary of Agriculture must give way thereto.

The Interstate Commerce Commission, by virtue of §§ 13(1) and 15(1) of the Interstate Commerce Act, has been given jurisdiction over unreasonable practices of carriers engaged in interstate transportation. This has application to the order entered herein, for the movement of live stock into unloading pens constitutes a part of their transportation; it is but the delivery of the consignee's shipment. Section 1(3) defines "transportation" as "all [fol. 80] services in connection with the receipt, delivery • • • storage, and handling of property transported".

It is said that the reasonable time within which the consignee must accept delivery of live stock consigned to it, to avoid the imposition of the yardage charges, is so indefinite as to render the order void. What constitutes a

reasonable time varies with the volume of live stock received; whether the run was light or heavy. The General Manager, and Vice President, of the Yards Company stated that in the ordinary course of delivery, animals are taken at the unloading pens, but that if this is to be done it must be done almost simultaneously with the unloading of animals into the pens. The immediate removal of the animals from the unloading pens is absolutely necessary in order to preserve an even flow of live stock from cars into the yards. Moreover, he said, when questioned as to whether the animals ever remain longer in the unloading pens, that they did during the night, and that when the last train comes in they remain some time in these pens; they might remain for 4 or 5 hours, but it was not usual.

The order is not indefinite in determining whether the Yards Company is a common carrier. Heretofore the Yards Company was held to be a common carrier. United States v. Union Stock Yard, 226 U. S. 286. It was not essential to make such a finding here to support the order granted. The Commission found that the Yards Company was the live stock terminal for all the complaining carriers. The Yards Company provided for the carriers the means of making deliveries of live stock to the consignees [fol. 81] at this public yard. But this delivery was a part of the transportation and of the duty of the carrier. Covington Stock Yards Co. v. Keith, 139 U. S. 128; Adams v. Mills, 286 U. S. 397.

It is also said that the order is erroneous because it fails to declare what should be done with, or take the place of, the charges made against the Hygrade Company with respect to the live stock consigned to it in Chicago. This was left to the discretion of the carriers, and the Yards Company, to be disposed of by some agreement among them with respect to the amount to be paid by the complainants to the Yards Company for the performance of this delivery service which is part of the duty of through transportation to be performed by the carriers. If the parties do not agree, a proceeding under paragraph 6 of § 15 of the Interstate Commerce Act might be instituted for the purpose of establishing just, reasonable, and equitable divisions of rates. If the present rates are inadequate, they may be raised in a suitable rate case brought before the Commission. The question here is not the rea-

sonableness of the charges but the unfairness of the practice generally pursued in collecting this extra charge for delivery. Adams v. Mills, 286 U. S. 397; United States v. Pa. R. R., 266 U. S. 191; Chicago, I. & L. Ry. v. United States, 270 U. S. 287.

After the Yards Company was declared a common carrier, in United States v. Union Stock Yard (226 U. S. 286), it made changes in the terms of its leases, but whether or not it changed its position as a common carrier we need not determine now, for it, in the performance of this duty, [fol. 82] rendered transportation services. United States v. Brooklyn Terminal, 249 U. S. 296. To be sure, it performed yardage services when it supplied holding pens, where care and attention to the animals were made possible, such as feeding, watering and bedding.

But, it is also true that the live stock moved over the rails owned by the Yards Company, though subleased to the Chicago & Indiana Railway Company, under a through route; and the Commission has found that, in Chicago, this is the only practical method of taking care of the volume of live stock traffic which moves to and from that city every day. When live stock is placed by the line haul carriers at the unloading platforms of the Yards Company, it is unloaded by employees of the Yards Company, who inform the consignees of its arrival. The Yards Company furnishes weights on which the railways base their freight charges and collects such charges from the consignees on account of the carriers and remits them to the carriers. As stated in Adams v. Mills (supra), "the yards are, in effect, terminals of the railroads."

The Yards Company might well have been found to be a common carrier even though it be but an agent of the complainants in the performance of their transportation service. United States v. Brooklyn Terminal, supra; Adams v. Mills, supra. That the carriers employ the yards of the Yards Company and the services of their employees in effecting delivery of live stock as part of their transportation service admits of no doubt. The evidence is clear that these yardage charges are imposed, collected [fol. 83] and retained by the Yards Company and are for services rendered to the complainants in the performance of their transportation duties. It is proper that the order of the Commission should be directed against the Yards Company. It was an unlawful practice for the Yards Com-

pany as well as the complainants to thus assess and make charges in addition to the prescribed transportation rates. They were indulging in a practice condemned by the Commission and the joint order against them is proper. North. Penna. R. R. v. Commercial Bank, 123 U. S. 727, 734; Covington Stock Yard Co. v. Keith, supra.

Congress recognized this duty when it legislated as to the jurisdiction of the Interstate Commerce Commission (Act of Feb. 4, 1887, ch. 104, § 1, 24 Stat. 379; Act of June 29, 1906, ch. 3591, 34 Stat. 584; Act of Feb. 8, 1920, ch. 91, § 400, 41 Stat. 474), and it was the intention of Congress to so regulate commerce as to place the regulation of all the services performed by common carriers by rail in the transportation of property with the Interstate Commerce Commission. Chicago, C. C. & St. L. Ry. Co. v. Dettlebach, 239 U. S. 592.

Complainants contend that § 15(5) of the present act to regulate commerce limits their duty with respect to live stock delivered at public stockyards, and they say that under this section their transportation duty ends when they have unloaded the live stock at suitable pens in the public stock yard. Section 15(5) expressly provides that the transportation of live stock shall include the service of unloading the live stock into suitable pens at the public stock yard. This is the same language with which the [fol. 84] term "railroad" and the term "transportation" are defined in para. 3 of § 1 of the Act, where it is provided that these terms shall "include" various services and facilities therein mentioned.

Complainants argue that this is a rate case, and the order entered reduces rates without making an appropriate finding as to their adequacy. What was before the Commission was a practice violation not a rate controversy. Los Angeles Switching Case, 234 U. S. 294. It was not a contest between carriers as to who shall bear the expense entailed in delivering live stock to the Hygrade Company. As said in Adams v. Mills (supra), "the reasonableness of the charge itself, and the complementary question whether the railroad should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto."

We think the Commission properly ruled that § 15(5) of the Act to regulate commerce did not limit its jurisdiction

over terminals and terminal facilities of the line haul carriers, and that its jurisdiction extended as provided for in para. 3, § 1 of the Act.

The suit is dismissed.

Dated: October 30th, 1934.

Martin T. Manton, Circuit Judge, John C. Knox, District Judge, Henry W. Goddard, District Judge.

[fol. 85] [File endorsement omitted.]

[fol. 86] In United States District Court

The Atchison, Topeka and Santa Fe Railway Company, et al., Petitioners,

vs.

The United States of America and Interstate Commerce Commission, Defendants

Final Decree—Filed Nov. 3, 1934

This cause having come on for final hearing by the special Court of three judges, constituted as required by the Act of October 22, 1913 (c. 32, 38 Stat. 208, 220, U. S. C., Title 28, sec. 47) and the Court, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined, for the reasons set forth in the opinion heretofore filed by this Court herein on October 31, 1934, that the petition should be dismissed for want of equity at the cost of the petitioners, it is

Ordered, Adjudged and Decreed, That the petition be, and the same is hereby, dismissed, for want of equity, at the cost of petitioners.

This 2nd day of November, 1934.

Martin T. Manton, United States Circuit Judge, Jno. C. Knox, United States District Judge, Henry W. Goddard, United States District Judge.

[fol. 87] Approved as to form.

Elmer B. Collins, Special Assistant to the Attorney General, For the United States. J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission. Hornblower, Miller, Miller & Boston, Solicitors for Hygrade Food Products Corporation.

[File Indorsement omitted.]

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 3, 1934

To:

Elmer B. Collins, Counsel for United States, Department of Justice, Washington, D. C.

J. Stanley Payne, Counsel for Interstate Commerce Commission, Washington, D. C.

Hornblower, Miller, Miller & Boston, Counsel for Hygrade Food Products Corporation, 15 Broad Street, New York, N. Y.

Charles E. Cotterill, Counsel for Union Stock Yard & Transit Company, 70 East 45th Street, New York, N. Y.

Luther M. Walter, Counsel for Union Stock Yard & Transit Company, Room 1522, #38 S. Dearborn Street, Chicago, Ill.

You and each of you are hereby notified that on the 2nd day of November, 1934, at 10 o'clock a. m. or as soon thereafter as counsel can be heard, we shall present to the Honorable Martin T. Manton, United States Circuit Judge, and the Honorable John C. Knox and Honorable Henry W. Goddard, United States District Judges, the petition of the petitioners herein for an appeal from the final order or decree made and entered in the District Court in the above entitled cause on the 2nd day of November, 1934, to the Supreme Court of the United States; and ask that an order be entered herein allowing said appeal and making the same returnable within thirty (30) days from November 2, 1934, a copy of said petition for appeal and assignment of errors therein referred to and a copy of said order being attached hereto.

Frank H. Towner, Solicitor for Petitioners.

[fol. 89] Received a copy of the foregoing notice, together with a copy of the petition for appeal, assignment of errors

and order therein referred to this 1st day of November, 1934.

Elmer B. Collins, Solicitor for United States. J. Stanley Payne, Solicitor for Interstate Commerce Commission. Hornblower, Miller, Miller & Boston, Solicitor for Hygrade Food Products Corporation. Luther M. Walter, Chas E. Cotterill, Solicitors for Union Stock Yard & Transit Company of Chicago.

[File Indorsement omitted.]

[fol. 90] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 3, 1934

To The Honorable Martin T. Manton, United States Circuit Judge; The Honorable John C. Knox; The Honorable Henry W. Goddard, United States District Judges.

Now come The Atchison, Topeka and Santa Fe Railway Company, et al., petitioners herein, by their solicitor, and feeling aggrieved by the final order or decree of the District Court made and entered herein on to wit, November 2, 1934, do hereby appeal therefrom to the Supreme Court of the United States, and pray that their appeal be allowed and that citation be issued as provided by law.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made. They pray that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted to the Supreme Court of the United States, and they further pray that a proper order relating to the security to be required of them be made.

Frank H. Towner, Solicitor for Petitioners, Atchison, Topeka & Santa Fe Railway Company, et al.

[File Indorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 3, 1934

Now come The Atchison, Topeka and Santa Fe Railway Company, et al., petitioners herein, and present with their petition for appeal herein this assignment of errors and say that in the record and proceedings in the above-entitled cause and the decree made and entered against them therein on the 2nd day of November, 1934, there is error in the particulars hereinafter set forth.

The District Court of the United States for the Southern District of New York erred in making the decree and in dismissing the petition herein in the following respects:

1. It erred in finding that the order of the Interstate Commerce Commission made on July 2nd, 1934, is not so indefinite and uncertain as to be invalid.

2. It erred in finding that it was not essential for said Commission to make a finding with respect to the common carrier status of the Union Stock Yard & Transit Company of Chicago.

3. It erred in finding that there was no obligation upon said Commission to definitely prescribe in said order of [fol. 92] July 2nd, 1934, the time and place at which the common carrier obligations of petitioners terminated.

4. It erred in finding that said order of July 2nd, 1934 was not invalid because of the failure of the Commission to make a finding with respect to the disposition to be made of the yardage charges of the Union Stock Yard & Transit Company of Chicago.

5. It erred in finding that said order of the Commission made on July 2nd, 1934 was not invalid because of the failure of said Commission to state in what respects and in what way the practices of petitioners violated the law.

6. It erred in finding that the Union Stock Yard & Transit Company of Chicago rendered transportation services upon the shipments of live stock dealt with in said order of said Commission made on July 2nd, 1934.

7. It erred in finding that the facilities of the Union Stock Yard & Transit Company of Chicago constitute the live stock terminals of petitioners in Chicago, Illinois.

8. It erred in finding that petitioners employed the facilities of the Union Stock Yard & Transit Company of Chicago and the services of its employees in effecting the delivery of live stock as a part of petitioners' transportation service.

9. It erred in finding unlawful the collection by petitioners and the Union Stock Yard & Transit Company of Chicago of the yardage charges dealt with in the Commission's order of July 2nd, 1934.

10. It erred in finding that the decision of said Commission was one in which said Commission made a finding of unreasonableness of a practice under Sections 1 and 15 of [fol. 93] the Act to Regulate Commerce.

11. It erred in finding that the practice condemned by said Commission in its order of July 2, 1934, was an unreasonable and unlawful practice.

12. It erred in finding that the case presented to the Commission in which said order of July 2nd, 1934 was entered was a case involving an unlawful practice and that it was not a case involving a rate controversy.

13. It erred in finding that under paragraph 3 of Section 1 of the Act to Regulate Commerce the jurisdiction of the Commission extends beyond a suitable unloading pen in the case of shipments of ordinary live stock in carloads consigned to public stock yards.

14. It erred in failing to find that under paragraph 5 of Section 15 of the Act to Regulate Commerce the transportation of ordinary live stock in carloads consigned to public stock yards ends when such live stock is deposited in a suitable pen at such public stock yards.

15. It erred in finding that the transportation service performed by petitioners upon shipments of ordinary live stock in carloads to the Union Stock Yard in Chicago, Illinois extends beyond suitable unloading pens at such stock yard.

16. It erred in finding or assuming that the record made in the proceedings before the Commission was sufficient to support the order made by the Commission therein on July 2, 1934.

17. It erred in finding that the petition herein should be dismissed.

18. It erred in failing to issue the injunction prayed for in the petition herein.

Wherefore, petitioners pray that said decree entered [fol. 94] herein on the 2nd day of November, 1934, be reversed and that said District Court of the United States for the Southern District of New York be directed to enter a decree granting the petition of petitioners and that said order of the Interstate Commerce Commission be declared void and perpetually set aside, suspended and annulled and that your petitioners be granted such other and further relief as may be appropriate.

Frank H. Towner, Solicitor for Petitioners.

[File indorsement omitted.]

[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR STAY OF ORDER OF INTERSTATE COMMERCE COMMISSION PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Nov. 3, 1934

Now come the plaintiffs herein, by their counsel, and present this motion for an order staying the order of the Interstate Commerce Commission made on July 2, 1934 in the proceeding pending before said Commission and known as its Docket 24375, Hygrade Food Products Corporation vs. Atchison, Topeka and Santa Fe Railway Company, pending an appeal herein to the Supreme Court of the United States, and in support of said motion show as follows:

(1) For almost seventy years the uninterrupted practice with respect to deliveries of livestock to consignees at the

Union Stock Yards in Chicago, Illinois, has been for the Union Stock Yard & Transit Company to require payment of its yardage charges by such consignees. Since the effective date of the Packers & Stockyards Act, 1921, those yardage charges have been contained in tariffs of the Union Stock Yard & Transit Company on file with the Secretary of Agriculture. The foregoing practice was begun and has been continued in good faith, and the right of the Union Stock Yard & Transit Company to so collect said yardage charges has never been judicially questioned up to this time. The order of the Commission entered in the proceedings before it requires a change in that practice, to the detriment of the Union Stock Yard & Transit Company and petitioners herein.

[fol. 96] (2) Ever since the effective date of the Packers & Stockyards Act, 1921, the Secretary of Agriculture, with the implied consent of the Interstate Commerce Commission, has exercised jurisdiction over the volume and propriety of the yardage charges so collected by the Union Stock Yard & Transit Company, exercising said authority upon the assumption that it was vested in him by the terms and provisions of said Act. The order of the Commission entered herein arrogates to the Commission some part of the authority heretofore exercised by the Secretary of Agriculture under the Packers & Stockyards Act, and creates a conflict of jurisdiction between two governmental regulatory authorities. Immediate enforcement of the order of the Commission prior to a final decision with respect thereto by the Supreme Court of the United States, would make it necessary for petitioners herein to make some election as to which regulatory authority has the jurisdiction which both now claim.

(3) The legal questions presented in the petition of petitioners to set aside and annul said order of the Interstate Commerce Commission are not free from doubt. The questions presented have not yet been decided by any other court and involve matters of statutory construction which have not heretofore been presented to the Supreme Court of the United States or any other court for construction. That these questions are not free from doubt is indicated by the fact that in the proceedings before the Commission, six Commissioners supported the order attacked herein and

five Commissioners dissented on the ground that the Commission did not have the jurisdiction apparently asserted in the order.

(4) The immediate enforcement of the order herein attacked, if that order should subsequently be set aside, will result in a serious and unnecessary disturbance in the delivery of livestock at the Union Stock Yard in Chicago, [fol. 97] Illinois. That stockyard now handles the largest daily volume of livestock of any stockyard in the United States. As the record before the Commission shows, the volume of shipments at certain hours during each day is so great that the utmost expedition is required both on the part of petitioners and of the Union Stock Yard & Transit Company in handling them in order to avoid delay and consequent damage. If the order of the Commission attacked herein is permitted to become effective pending an appeal herein to the Supreme Court of the United States, the present orderly method of handling such stock will necessarily be disrupted. Petitioners will have to determine whether the order requires them to pay the yardage charges involved to the Yards Company or whether it requires the Yards Company to forego the collection of such charges. The settlement of such a dispute might require considerable time during which petitioners might refuse to pay such yardage charges, and as a result of such refusal, the Union Stock Yard & Transit Company might decline to handle such shipments, or in any case, to deliver them to consignees until its charges were secured to it in some way. Such a development would necessarily result in delay in the handling of livestock shipments to the stockyards at Chicago with consequent damage to the traffic and to the public interest therein.

(5) If the order attacked herein should become effective pending an appeal herein to the Supreme Court of the United States, and if petitioners, in order to avoid the disturbances and disruptions of traffic which would result from their refusal to pay the yardage charges of the Yards Company, should consent to pay such charges pending such appeal, and the order of the Interstate Commerce Commission should, on such appeal, be set aside and annulled, petitioners would sustain irreparable damage in that they would have paid, in attempted compliance with said order, large

amounts of money on behalf of various consignees of shipments transported by them to the Union Stock Yard in Chicago, which amounts they would probably be unable to thereafter recover from such consignees. In any case, [fol. 98] petitioners would be subjected to substantial expense in recovering or attempting to recover any such amounts so paid by them, and such expense could not be recovered by petitioners.

(6) Petitioners herein hereby tender a bond, in an amount to be fixed by this Court, to protect the Hygrade Food Products Corporation in the amount of such yardage charges which will be paid by it during the time consumed in perfecting an appeal herein to the Supreme Court of the United States and in securing the decision of that Court with respect to the validity of the order of the Interstate Commerce Commission. Said Hygrade Food Products Corporation is the only company to which reparation is awarded by the order of the Interstate Commerce Commission attacked in this suit. The giving of such a bond will completely and adequately protect it with respect to any such charges paid by it during the pendency of such appeal should it finally be determined that the said order of the Interstate Commerce Commission is valid.

Wherefore, petitioners pray that an order be entered herein staying the enforcement of the order of the Interstate Commerce Commission made by it on July 2, 1934 in the said proceeding before it, pending an appeal herein to the Supreme Court of the United States and the decision of that court on such appeal.

Frank H. Towner, Counsel for Petitioners.

[File endorsement omitted.]

[fol. 99] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity. No. 78-351

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Petitioners,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

ORDER ALLOWING APPEAL—Filed Nov. 3, 1934

Upon the entering of the final decree in this cause came Frank H. Towner, solicitor and counsel for petitioners and filed their assignment of errors and petition for appeal, and it is hereby

Ordered, That an appeal by petitioners in the above entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on November 2, 1934, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States, said appeal being hereby made returnable thirty (30) days from the date hereof.

It is further ordered that the bond on appeal be and it is hereby fixed at the sum of two hundred fifty dollars ($250).

Martin T. Manton, United States Circuit Judge. Jno. C. Knox, Henry W. Goddard, United States District Judges.

November 2, 1934.

[File endorsement omitted.]

[fols. 100-102] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ORDER STAYING ORDER OF I. C. C.—Filed Nov. 13, 1934

This cause came on to be heard at this term on motion of counsel for the petitioners and thereupon upon consideration thereof, it was

Ordered that the order of the Interstate Commerce Commission made on July 2, 1934, in the proceeding pending before said Commission entitled "Hygrade Food Products Corporation against Atchison, Topeka and Santa Fe Railway Corporation, Docket 24,375," be, and the same hereby is, stayed for a period of 30 days from November 2, 1934, pending the appeal herein to the Supreme Court of the United States, with leave to the petitioners to apply to a Judge of the Supreme Court of the United States for a further stay.

November 13th, 1934.

Martin T. Manton, United States Circuit Judge.
Jno. C. Knox, Henry W. Goddard, United States District Judges.

[File endorsement omitted.]

[fols. 103-106] Bond on appeal for $250.00, approved and filed November 23, 1934, omitted in printing.

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted.]

NOTICE OF MOTION FOR ORDER OF SEVERANCE—Filed Nov. 23, 1934

To: The Union Stock Yard and Transit Company of Chicago, and Charles E. Cotterill and Luther M. Walter, Its Solicitors.

You are hereby notified that on November 2, 1934, in accordance with notice previously served upon you, The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company; The Alton Railroad Company; Charles M. Thomson, as trustee of the railways and property of Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louis-

ville Railway Company; Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Milwaukee, St. Paul and Pacific Railroad Company; The Chicago River and Indiana Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees of the railways and property of The Chicago, Rock Island and Pacific Railway Company and The Chicago, Rock Island and Gulf Railway Company; Chicago Saint Paul, Minneapolis and Omaha Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); Minneapolis, Saint Paul & [fol. 108] Sault Ste. Marie Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers of the railways and property of Wabash Railway Company, petitioners herein, presented their petition for appeal to the Supreme Court of the United States from the final decree entered on November 2, 1934 dismissing their petition herein; and that on November 2, 1934 an order was entered herein granting said appeal, a copy of said order having theretofore been served upon you.

You are hereby invited to join in said appeal as a party appellant or be barred therefrom by order of severance in the event you refuse to join in said appeal.

You are further notified that said petitioners will present to the Honorable Martin T. Manton, United States Circuit Judge, and John C. Knox and Henry W. Goddard, United States District Judges, at 10 o'clock in the forenoon, on November 23, 1934, or as soon thereafter as said matter may be heard, in the room usually occupied by them as a court room, in the Old United States Post Office Building, Broadway and Park Place, Borough of Manhatton, City of New York, their motion for an order of severance herein, a copy of said motion and order being served upon you herewith.

The Atchison, Topeka and Santa Fe Railway Company, et al., by Frank H. Towner, Their Solicitor.

Received a copy of the foregoing notice together with a

copy of the motion and order therein referred to, this 15th day of November, 1934.

Chas. E. Cotterill, Mark W. Potter, Solicitors for The Union Stock Yard and Transit Company of Chicago.

[File endorsement omitted.]

[fol. 109] In United States District Court

[Title omitted.]

Motion for Order of Severance—Filed Nov. 23, 1934

Now come The Atchison, Topeka and Santa Fe Railway Company, et al., petitioners in the above-entitled cause, and show to the Court that heretofore, on November 2, 1934, they prayed and were granted on appeal to the Supreme Court of the United States from the final decree entered herein on November 2, 1934, notice of the presentation of the petition for said appeal having been theretofore served upon all parties hereto; that on November 15, 1934, they served upon The Union Stock Yard and Transit Company of Chicago, a party hereto, a notice requesting it to join in such appeal; that said party has failed and refused to join these petitioners in such appeal and that petitioners here offer proof of the facts hereinbefore stated.

Wherefore, these petitioners move the Court for an order herein granting to these petitioners a severance and the right to prosecute their said appeal without joining said The Union Stock Yard and Transit Company of Chicago therein.

The Atchison, Topeka and Santa Fe Railway Company, et al. By Frank H. Towner, Their Solicitor.

[File endorsement omitted.]

[fol. 110] In United States District Court

[Title omitted.]

Order Granting Severance

Upon consideration of the motion filed herein this day by The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company; The Balti-

more and Ohio Chicago Terminal Railroad Company; The Chesapeake and Ohio Railway Company; The Alton Railroad Company; Charles M. Thomson, as trustee of the railways and property of Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington and Quincy Railroad Company; Chicago, Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Milwaukee, St. Paul and Pacific Railroad Company; The Chicago River and Indiana Railroad Company; Frank O. Lowden, James E. Gorman and Joseph B. Fleming, as trustees of the railways and property of The Chicago, Rock Island and Pacific Railway Company and The Chicago, Rock Island and Gulf Railway Company; Chicago Saint Paul, Minneapolis and Omaha Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); Illinois Central Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); Minneapolis, Saint Paul & Sault Ste. Marie Railway Company; The New York Central Railroad Company; The New York, Chicago and Saint [fol. 111] Louis Railroad Company; The Pennsylvania Railroad Company; and Norman B. Pitcairn and Frank C. Nicodemus, Jr., as receivers of the railways and property of Wabash Railway Company, petitioners herein, for severance and an order allowing them to prosecute their appeal to the Supreme Court of the United States from the final decree entered herein on November 2, 1934 without joining with them The Union Stock Yard and Transit Company of Chicago, and the Court having considered said motion and being advised in the premises, and finding that the said The Atchison, Topeka and Santa Fe Railway Company, et al., petitioners herein, notified all other parties to this cause of the presentation of their petition for said appeal; that said appeal was prayed and an order granting it entered herein in open court, and that said The Union Stock Yard and Transit Company of Chicago has refused to join in said appeal, it is therefore

Ordered that said The Atchison, Topeka and Santa Fe Railway Company, et al., petitioners herein, are hereby

granted a severance, and that they may prosecute their said appeal herein to the Supreme Court of the United States without joining said The Union Stock Yard and Transit Company as a party thereto.

Martin T. Manton, United States Circuit Judge.
Jno. C. Knox, Henry W. Goddard, United States District Judges.

November 23, 1934.

[fol. 112] IN UNITED STATES DISTRICT COURT

[Title omitted.]

NOTICE OF NARRATIVE STATEMENT OF EVIDENCE, ETC.—Filed Dec. 17, 1934

To: United States of America, Interstate Commerce Commission, and Hygrade Food Products Corporation, Defendants herein:

Please take notice that the petitioners (appellants in the above cause) have lodged in the Clerk's office of the United States District Court for the Southern District of New York, at New York City, New York, for the examination of the parties hereto, the narrative statement of evidence to be included in the transcript of record on appeal to the Supreme Court of the United States from the final decree entered in the above proceeding on November 2, 1934.

Further please take notice that on the 17th day of December, 1934, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the court room of said United States District Court, in the Old United States Post Office Building, Broadway and Park Place, Borough of Manhattan, City of New York, petitioners (appellants) will move the Court to enter an order approving said narrative statement of evidence and providing for the certification to the Supreme Court of the United States of the exhibits filed upon the trial of said cause in said District Court, said exhibits to be certified and forwarded by the Clerk of the District Court to the Supreme Court of the United States as original exhibits, not as part of the transcript of

record but separately therefrom, a copy of said order being served upon you herewith.

Frank H. Towner, Counsel for Petitioners.

[fol. 113] Received a copy of the foregoing notice and order therein referred to, this 17th day of December, 1934.

Elmer B. Collins, For United States of America. J. Stanley Payne, For Interstate Commerce Commission. Hornblower, Miller, Miller & Boston, For Hygrade Food Products Corporation.

[File endorsement omitted.]

[fol. 114] In United States District Court

[Title omitted.]

Order Approving Narrative Statement of Evidence, etc.—Filed Dec. 18, 1934

This cause coming on for hearing on the motion of petitioners (appellants) for an order approving the narrative statement of evidence filed herein and certifying original exhibits to the Supreme Court of the United States, and the Court being advised in the premises, it is

Ordered:

(1) That the narrative statement of evidence filed herein, and which, with the original exhibits offered in evidence and to be certified separately to the Supreme Court of the United States, is a true and complete statement of all the evidence introduced in this cause and comprises all the evidence offered and received on the trial hereof, be and it is hereby approved.

(2) That the Clerk of this Court, in preparing the transcript of the record on the appeal herein to the Supreme Court of the United States, shall certify to said Court all exhibits and other documents which were attached to petitioners' Exhibit 1 introduced in evidence on the trial of this Court in this Court, the said exhibits so attached to petitioners' Exhibit 1 being marked before the Interstate Commerce Commission as Exhibits 1 to 23, both inclusive,

and including also two additional exhibits furnished to the Interstate Commerce Commission subsequent to the close of the hearing before it; but shall not include the transcript [fol. 115] of oral testimony included in said petitioners' Exhibit 1, for the reason that said testimony has been reduced to narrative form and is being certified and forwarded in the transcript of record; that said exhibits shall be certified and forwarded by the Clerk of this Court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record but separately therefrom, and that any party hereto may refer to said original exhibits in their briefs and arguments with like effect as though they were printed as part of the record.

Martin T. Manton, United States Circuit Judge.
Jno. C. Knox, Henry W. Goddard, United States District Judges.

December 18th, 1934.

[File endorsement omitted.]

[fol. 116] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated by and between the parties hereto, by their respective counsel, for the purpose of settling the record herein on appeal to the Supreme Court of the United States.

(1) That the narrative statement of evidence filed herein is a true and correct statement in narrative form of the proceedings had and of the testimony introduced on the trial of the above cause and includes a true and correct statement in narrative form of the oral testimony taken by the Interstate Commerce Commission in the proceedings before it known as its Docket 24375, Hygrade Food Products Corporation v. The Atchison, Topeka and Santa Fe Railway Company, et al., the entire record in said proceedings before said Commission having been introduced in evidence in this cause as Petitioners' Exhibit 1.

(2) That the narrative statement of evidence filed herein, which includes a narrative statement of the oral testimony taken by the Interstate Commerce Commission in the proceedings before it known as its Docket 24375, Hygrade Food Products Corporation v. The Atchison, Topeka and Santa Fe Railway Company, et al., sets forth in condensed form all oral testimony offered on the trial hereof which is essential to the decision of the questions presented by the appeal.

(3) That the Clerk of this Court, in preparing the transcript of record on appeal in the above entitled cause to the [fol. 117] Supreme Court of the United States shall certify to said Court the original exhibits and all other documents which were attached to Petitioners' Exhibit 1, introduced in evidence on the trial of said cause, the said Exhibits so attached to Petitioners' Exhibit 1 being marked Exhibits 1 to 23, both inclusive, and also including two additional exhibits furnished to the Interstate Commerce Commission after the conclusion of the hearings before it; but shall not include the transcript of oral testimony included in said Petitioners' Exhibit 1 for the reason that said testimony has been reduced to narrative form and is being certified and forwarded in the transcript of record; that said exhibits and other documents so attached to Petitioners' Exhibit 1 shall be certified and forwarded by the Clerk of this Court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record but separately therefrom, and that any party hereto may refer to said original exhibits and other documents in their briefs and arguments with like effect as though they were printed as part of the record.

Elmer B. Collins, for United States of America. J. Stanley Payne, for Interstate Commerce Commission. Hornblower, Miller, Miller and Boston, for Hygrade Food Products Corporation. Frank H. Towner, for Petitioners (Appellants).

[fol. 118] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934.

No. ——

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, ET AL., Appellees.

No. ——

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, Appellant,

vs.

UNITED STATES OF AMERICA, ET AL., Appellees.

ORDER STAYING ORDER OF I. C. C.

This cause coming on to be heard upon the motions of appellants (petitioners) for the entry of an order staying the enforcement of an order of the Interstate Commerce Commission made by it on July 2, 1934 in the proceedings before it known as its Docket 24375, Hygrade Food Products Corporation vs. Atchison, Topeka and Santa Fe Railway Company, et al., pending appeals to the Supreme Court of the United States and the determination of said appeals in said Court, it is

Ordered that the enforcement, operation and execution of said order of the Interstate Commerce Commission, entered on July 2, 1934, in the said proceedings before it, be and it is hereby stayed during the pendency and until the determination of said appeal by the Supreme Court of the United States, upon condition that appellants (petitioners) file herein, within twenty (20) days herefrom a joint and several bond in the sum of Five Thousand Dollars ($5,000.-00), the obligees in said bond to be the United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation.

It is further ordered that the aforesaid bond shall be conditioned that appellants (petitioners) will prosecute their

[fols. 119 & 120] appeals, with effect and shall pay or cause to be paid all net amounts which may be due from them or any of them to United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation, or any of them, during the period November 5, 1934 until the decision of the Supreme Court of the United States on the appeals taken herein under the order entered by said Intrstate Commerce Commission on July 2, 1934 in said proceedings before it.

Harlan F. Stone, Justice of the Supreme Court of the United States.

November 15, 1934.

[fols.121-126] Bond on stay for $5,000, approved and filed Dec. 3, 1934, omitted in printing.

[fols. 127-129] Citation in usual form showing service on Elmer B. Collins et al. Filed Nov. 20, 1934, omitted in printing.

[fol. 130] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 131] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity. No. 78-351.

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL., Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 27, 1934

To the Clerk of the United States District Court for the Southern District of New York:

SIR: You will please prepare a transcript of record to be transmitted to the Supreme Court of the United States, in

pursuance to the separate appeal of The Union Stock Yard and Transit Company of Chicago heretofore taken in this cause, to the extent of including therein the following:

1. Application of The Union Stock Yard and Transit Company of Chicago to become a party to the proceedings.
2. Order of court allowing such application and making it a party.
3. Notice of intended application for appeal.
4. Acknowledgment of notice of intended application for appeal.

[fol. 132] 5. Order of court granting appeal.

6. Assignment of errors.
7. Bond for costs on appeal.
8. Notice of order allowing appeal.
9. Citation on appeal.
10. Statement supporting jurisdiction of Supreme Court of the United States on appeal.
11. Order of court directing avoidance of unnecessary duplication of record on appeal.
12. Acknowledgements of notices of order allowing appeal.
13. Clerk's certificate of transcript of record.

You will please show filing dates and docket entries but omit all captions except the application to become a party to the proceedings and the application for appeal.

Charles E. Cotterill, Solicitor for Petitioner. Mark W. Potter, Counsel.

Dated New York, N. Y., November 14, 1934.

[File endorsement omitted.]

[fol. 133] IN UNITED STATES DISTRICT COURT

[Title omitted.]

INTERVENTION OF UNION STOCK YARD AND TRANSIT CO. OF CHICAGO—Filed Nov. 1, 1934.

Comes now The Union Stock Yard and Transit Company of Chicago by its attorneys, Luther M. Walter, of Chicago,

and Charles E. Cotterill, of New York City, and says that it was a party defendant in the proceedings before the Interstate Commerce Commission out of which eventuated the order of such Commission that is involved in the above entitled proceedings; that the order of the Commission is directed to The Union Stock Yard and Transit Company of Chicago along with other named defendants before the Commission; that because of the foregoing it has an interest in these proceedings before this Honorable Court; and that in view of the foregoing, under the statutes of Congress, The Union Stock Yard and Transit Company of Chicago is entitled to be a party to these proceedings as of right and so desires. Therefore, such The Union Stock Yard and Transit Company of Chicago now becomes a party to these proceedings before this Honorable Court by this intervention and respectfully avers that such order of the Interstate Commerce Commission as so directed to it and if [fol. 134] so applied to it is and would be wholly null and void.

The Union Stock Yard and Transit Company of Chicago, by Luther M. Walter, Chas. E. Cotterill, 70 East 45th Street, its attorneys.

Dated, October 2, 1934.

The foregoing is approved and The Union Stock Yard and Transit Company of Chicago is made a party to the above entitled proceedings.

Jno. C. Knox.

Dated, October 2, 1934.

Service of the above is acknowledged this date of October 2, 1934.

Elmer B. Collins, Attorney for the United States. J. Stanley Payne, Attorney for the Interstate Commerce Commission. Hornblower, Miller, Miller & Boston, Attorneys for Hygrade Food Products Corporation. F. H. Towner, Attorney for Trunk Line Railroad, Petitioners.

[File endorsement omitted]

[fol. 135] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ORDER GRANTING SEVERANCE

Upon consideration of the motion filed herein this day by The Union Stock Yard and Transit Company of Chicago for severance and an order allowing it to prosecute its appeal to the Supreme Court of the United States from the final decree entered on November 2, 1934, without joining with it The Atchison, Topeka & Santa Fe Railway Company and other original petitioners and the Court having considered said motion and been advised in the premises, and hearing that the said The Union Stock Yard and Transit Company of Chicago notified all other parties to the cause of the presentation of its petition for said appeal; that said appeal was prayed and an order granting it was entered by this Court on November 14, 1934, and that the said The Atchison, Topeka and Santa Fe Railway Company and other original petitioners have refused to join in said appeal, it is therefore.

Ordered that the said The Union Stock Yard and Transit Company of Chicago is hereby granted a severance and it may prosecute its said appeal to the Supreme Court of the [fol. 136] United States without joining The Atchison, Topeka and Santa Fe Railway Company and other original petitioners.

Martin T. Manton, United States Circuit Judge.
Jno. C. Knox, Henry W. Goddard, United States District Judges.

November 23, 1934.

[fol. 137] IN UNITED STATES DISTRICT COURT

[Title omitted.]

MOTION FOR ORDER OF SEVERANCE

Now comes The Union Stock Yard and Transit Company of Chicago, a party petitioner in the cause entitled in this court "The Atchison, Topeka and Santa Fe Railway Company, et al., v. The United States of America, et al.", being

the same Equity Docket No. 78–351, and shows to the Court that heretofore on November 14, 1934, it prayed and was granted an appeal to the Supreme Court of the United States from the final decree entered in said proceedings on November 2, 1934, notice of presentation of petition for said appeal having been theretofore served on all parties in such proceedings; that on November 20, 1934, it served upon The Atchison, Topeka and Santa Fe Railway Company and other original petitioners a notice requesting them to join in such appeal; that said parties have failed and refused to join in such appeal and that appellant here offers proof of the facts hereinabove stated.

Wherefore, this appellant moves the Court for an order herein granting to it a severance and the right to prosecute the said appeal without joining the said The Atchison, Topeka and Santa Fe Railway Company and other original petitioners therein.

The Union Stock Yard and Transit Company of Chicago, by Chas. E. Cotterill, its Solicitor. Mark W. Potter, Counsel.

[fol. 138] IN UNITED STATES DISTRICT COURT

[Title omitted.]

NOTICE OF MOTION FOR ORDER OF SEVERANCE—Filed Nov. 23, 1934

To: The Atchison, Topeka and Santa Fe Railway Company, et al., and Frank H. Towner and Cravath, De Gersdorff, Swaine & Wood, Their Solicitor and Counsel.

You are hereby notified that on November 14, 1934, in accordance with notice previously served upon you, The Union Stock Yard and Transit Company of Chicago presented its petition for appeal to the Supreme Court of the United States on the final decree entered on November 2, 1934, dismissing the bill of complaint herein; and that on November 14, 1934, an order was entered granting said appeal, a copy of said order having heretofore been served upon you.

You are hereby notified that said appellant will present to the Hon. Martin T. Manton, United States Circuit Judge,

and the Hon. John C. Knox and the Hon. Henry W. Goddard, United States District Judges, at 10:00 o'clock in the forenoon of November 23, 1934, or as soon thereafter as said matter may be heard, its motion for an order of sever-
[fol. 139] ance herein, a copy of said motion and order being served upon you herewith.

The Union Stock Yard and Transit Company of Chicago, by Chas. E. Cotterill, Its Solicitor. Mark W. Potter, Counsel.

Received a copy of the foregoing notice together with a copy of the motion and order therein referred to, this 20th day of November, 1934.

Frank H. Towner, Solicitor for The Atchison, Topeka & Santa Fe Railway Company, et al., by Cravath, de Gersdorff, Swaine & Wood, of Counsel.

[File endorsement omitted]

[fol. 140] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 27, 1934.

To: Elmer B. Collins,
Counsel for United States,
Department of Justice,
Washington, D. C.

J. Stanley Payne,
Counsel for Interstate Commerce Commission,
Washington, D. C.

Hornblower, Miller, Miller & Boston,
Counsel for Hygrade Products Corporation,
15 Broad Street,
New York, N. Y.

Cravath, DeGersdorff, Swaine & Wood,
Counsel for Railroad Companies,
15 Broad Street,
New York, N. Y.

You and each of you are hereby notified that on the 14th day of November, 1934, at 4:00 P. M., or as soon thereafter as counsel can be heard, we shall present to the Honorable Martin T. Manton, United States Circuit Judge, and the

Honorable John C. Knox and the Honorable Henry W. Goddard, United States District Judges, the petition of the Union Stock Yard and Transit Company of Chicago for an appeal to the Supreme Court of the United States from [fol. 141] the final order and decree made and entered in the District Court on the 2nd day of November, 1934, in the cause entitled "The Atchison, Topeka and Santa Fe Railway Company, et al., v. The United States of America and Interstate Commerce Commission" in which The Union Stock Yard and Transit Company of Chicago was and is a party; and we shall ask that an order be entered allowing said appeal and making the same returnable within thirty (30) days, from November 14th, 1934, a copy of said petition for appeal, and assignment of errors therein referred to and a copy of said proposed order being attached hereto.

Chas. E. Cotterill, Solicitor for Petitioner. Mark W. Potter, Counsel.

[File endorsement omitted.]

[fol. 142] [Title omitted]

Acknowledgment of Notice of Intention to Appeal

This acknowledges a copy of the Notice of The Union Stock Yard and Transit Company of Chicago of its intention to appeal to the Supreme Court of the United States in the above matter; and also acknowledges a copy of the Assignment of Errors and of the Proposed Order of the District Court allowing appeal.

Elmer B. Collins, Special Asst. to the Atty. Gen'l, Solicitor for the United States of America.

[fol. 143] [Title omitted]

Acknowledgment of Notice of Intention to Appeal

This acknowledges a copy of the Notice of The Union Stock Yard and Transit Company of Chicago of its intention to appeal to the Supreme Court of the United States in the above matter; and also acknowledges a copy of the Assignment of Errors and of the Proposed Order of the District Court allowing appeal.

Hornblower, Miller, Miller & Boston, Solicitors for Hygrade Food Products Corporation.

[fol. 144] [Title omitted]

Acknowledgment of Notice of Intention to Appeal.

This acknowledges a copy of the Notice of The Union Stock Yard and Transit Company of Chicago of its intention to appeal to the Supreme Court of the United States in the above matter; and also acknowledges a copy of the Assignment of Errors and of the Proposed Order of the District Court allowing appeal.

Cravath, deGersdorff, Swaine & Wood, Counsel for Railroad Companies.

[fol. 145] [Title omitted]

Acknowledgment of Notice of Intention to Appeal

This acknowledges a copy of the Notice of The Union Stock Yard and Transit Company of Chicago of its intention to appeal to the Supreme Court of the United States in the above matter; and also acknowledges a copy of the Assignment of Errors and of the Proposed Order of the District Court allowing appeal.

J. Stanley Payne, Solicitor for Interstate Commerce Commission.

[fol. 146] In United States District Court for the Southern District of New York

Equity. No. 78-351

The Union Stock Yard and Transit Company of Chicago, Petitioner,

vs.

The United States of America, et al., Defendants

Order Allowing Appeal

Upon the entering of the final decree in the cause entitled "The Atchison, Topeka and Santa Fe Railway Company, et al., v. The United States of America and Interstate Commerce Commission," being the same Equity No. 78-351, came Charles E. Cotterill and Mark W. Potter, Solicitor

and Counsel respectively for The Union Stock Yard and Transit Company of Chicago, and filed in behalf of such party a petition for appeal and assignment of errors; and it is hereby

Ordered, that an appeal by The Union Stock Yard and Transit Company of Chicago in such cause to the Supreme Court of the United States from the final decree heretofore filed and entered on November 2, 1934, be and the same is hereby allowed, said appeal hereby made returnable thirty (30) days from the date hereof; that the bond on appeal be [fol. 147] and it is hereby fixed at the sum of Two Hundred Fifty Dollars ($250.00); and that there be transmitted to the Supreme Court of the United States a certified transcript of such parts of the record in the proceedings as are described in the præcipe and accompanying order of this court.

Martin T. Manton, United States Circuit Judge.
Jno. C. Knox, Henry W. Goddard, United States District Judges.

Dated November 14, 1934.

[fol. 148] In United States District Court

[Title omitted]

Assignment of Errors—Filed Nov. 27, 1934

Now comes the Union Stock Yard and Transit Company of Chicago, a party to the proceedings in this court entitled "The Atchison, Topeka and Santa Fe Railway Company, et al., v. The United States of America and Interstate Commerce Commission," being the same Equity Docket No. 78-351, and presents with its petition for appeal herein this assignment of errors and says that in the record and proceedings in such cause and the final decree made and entered against it therein on the 2nd day of November, 1934, there is error in the particulars hereinafter set forth.

The District Court of the United States for the Southern District of New York erred in making the decree and in dismissing the proceedings for injunction and nullification of the Commission's order in the following respects:

1. The court erred in holding that it was not necessary for either the court or the Commission to determine whether

[fol. 149] or not the Stock Yard Company is a "common carrier engaged in the transportation of property by railroad."

2. The court erred in not holding that the Stock Yard Company is not a "common carrier engaged in the transportation of property by railroad" and therefore not subject to the order of the Commission.

3. The court erred in not holding that the Commission erred in not holding that the Stock Yard Company is not a "common carrier engaged in the transportation of property by railroad" and therefore not subject to the order of the Commission.

4. The court erred in holding that the Stock Yard Company was properly subject to the Commission's order for the reason that the Stock Yard Company supplies to the railroad companies, under agreements with them, certain physical livestock terminal facilities and certain physical services coming within the definition of "transportation" contained in Paragraph 3 of Section 1 of the Interstate Commerce Act.

5. The court erred in holding that Stock Yard Company properly subject to the Commission's order although holding at the same time that it is incumbent upon the railroad companies to pay the Yard Company its proper "yardage" charges on livestock delivered at unloading pens.

6. The court erred in holding that should there be disagreement between the railroad companies and the Yard Company as to the amount of "yardage" charges to which the Yard Company may deem itself entitled on livestock delivered at unloading pens the remedy would be under Paragraph 6 of Section 15 of the Interstate Commerce Act for the fixation of "divisions" of joint through rates.

[fol. 150] 7. The court erred in holding that the consignee's use of the Yard Company runways and other physical facilities leading into the Hygrade Food Products Corporation plant outside the Yard are facilities of "transportation by railroad" within the Interstate Commerce Act.

8. The court erred in holding the Yard Company properly subject to the Commission's order because of the failure of the railroads to arrange with the Yard Company that

the Hygrade Company might without extra charge use the Yard Company properties and facilities in removing livestock into its plant from the unloading pens.

9. The court erred in not holding the order of the Commission unsupported by evidence wherein such order declares that there are no "services" performed beyond the unloading pens for which extra compensation is payable under the law by the Hygrade Company.

10. The court erred in holding that the decision of the Commission was one in which the Commission had made a finding of "unreasonableness" of a "practice" under Sections 1 and 15 of the Interstate Commerce Act.

11. The court erred in holding that the Commission's findings of "unreasonableness" of a "practice" were supported by evidence.

12. The court erred in holding that the jurisdiction of the Commission under Paragraph 3 of Section 1 and of Paragraph 5 of Section 15 of the Interstate Commerce Act extends beyond suitable unloading pens in The Union Stock Yard and Transit Company of Chicago in the case of shipments of ordinary livestock in carloads consigned to the Hygrade Company at such public stockyards.

[fol. 151] 13. The court erred in failing to hold that under Paragraph 5 of Section 15 of the Interstate Commerce Act the transportation obligation of the railroads in respect to ordinary livestock in carloads consigned to shippers at The Union Stock Yard and Transit Company of Chicago ends when such livestock is deposited into suitable pens at such public stock yards.

14. The court erred in not holding that the Packers and Stockyards Act of Congress in *in pari materia* with Paragraph 5 of Section 15 of the Interstate Commerce Act and that the two together vest in the United States Secretary of Agriculture jurisdiction with respect to facilities, services and charges beyond unloading pens in The Union Stock Yard and Transit Company of Chicago.

15. The court erred in holding that the ordinary duties of railroads in respect of delivery of livestock in public stockyards into suitable unloading pens are enlarged and extended in instances of shipments transported to The

Union Stock Yard and Transit Company of Chicago because the railroads have constituted such place their own livestock terminal and hence that the railroad duty thereat is the same as would be the railroad duty at individual livestock delivery facilities on their own rails in Chicago.

16. The court erred in finding or assuming that the record made in the proceedings before the Commission was sufficient to support the order made by the Commission therein on July 2, 1934.

17. The court erred in not holding the order of the Commission invalid as a matter of law and as beyond the authority and jurisdictoin of the Commission.

18. The court erred in finding that the proceedings for injunction and nullification of the Commission's order [fol. 152] should be dismissed and in failing to issue injunction as sought.

Wherefore, petitioner prays that said decree entered herein on the 2nd day of November, 1934, be reversed and that said District Court of the United States for the Southern District of New York be directed to enter a decree declaring such order of the Commission void and perpetually setting it aside, and suspending and annulling it, and enjoining its enforcement, and that petitioner be granted such other and further relief as may be appropriate.

Chas. E. Cotterill, Solicitor for The Union Stock Yard and Transit Company of Chicago. Mark W. Potter, Counsel.

Dated November 12, 1934.

[File endorsement omitted.]

[fol. 153] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—filed Nov. 27, 1934

To the Honorable Martin T. Manton, United States Circuit Judge; the Honorable John C. Knox; the Honorable Henry W. Goddard, United States District Judges.

Now comes the Union Stock Yard and Transit Company of Chicago, by its Solicitor and Counsel, and says that it

was and is a party to the proceedings in and before this court entitled "The Atchison, Topeka and Santa Fe Railway Company, et al., vs. The United States of America and Interstate Commerce Commission," being the same Equity Docket No. 78-351; that it feels aggrieved by the final order and decree of the District Court made and entered in such cause on the 2nd day of November, 1934, in respects which are in part distinctive, separate and peculiar to this petitioner for appeal; and the said The Union Stock Yard and Transit Company of Chicago does hereby appeal to the Supreme Court of the United States from such final decree [fol. 154] of this court, and prays that its appeal be allowed and that citation be issued as provided by law.

The particulars wherein it considers such final decree erroneous are set forth in the Assignment of Errors on file to which reference is made.

It is further respectfully prayed that so far as may be necessary a transcript of the record, proceedings and papers on which such final decree was made and entered, and of the papers on appeal, all duly authenticated, may be transmitted to the Supreme Court of the United States and that a proper order relating to the security that may be required of it be made.

Chas E. Cotterill, Solicitor for The Union Stock Yard and Transit Company of Chicago. Mark W. Potter, Counsel.

Dated at New York, N. Y., November 14, 1934.

[File endorsement omitted.]

[fol. 155] Undertaking in the sum of $250 for costs on appeal. Filed and approved on Nov. 28, 1934.

[fols. 156-159] Citation in usual form showing service on J. Stanley Payne et al. omitted in printing.

[fol. 160] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF THE COURT RESPECTING TRANSCRIPT OF RECORD FOR THE PURPOSE OF APPEAL OF THE STOCK YARD COMPANY—Filed Nov. 27, 1934

This court having, on November 14, 1934, allowed to The Union Stock Yard and Transit Company of Chicago a separate appeal from the final decree of this court, dated November 2, 1934, in the cause then entitled "The Atchison, Topeka and Santa Fe Railway Company, et al., v. The United States of America, et al.", being Equity Docket 78-351, and there having been allowed by this court to The Atchison, Topeka and Santa Fe Railway Company and other railway company petitioners their separate appeal to the Supreme Court of the United States in which the record of proceedings before this court has been directed to be made up by the Clerk for transmittal to the Supreme Court of the United States, and it appearing to the court that such transcript of record so taken up on the appeal of the railway companies will present to the Supreme Court all needed parts of the record of proceedings before this court other than the appeal papers of the Stock Yard Company for [fol. 161] the purpose of considering both appeals and that it would be unduly burdensome upon the courts and the parties, and unduly expensive, for any part of such record of the proceedings in this court to be duplicated in the separate appeals so being taken except to the extent necessary, and by virtue of special authority conferred upon this court by the District Court Jurisdiction Act in respect to the promotion of justice and economy by particular procedural orders as to this court may appear meet and proper,

It is ordered, that the Clerk of this court, in making up the transcript of record for appeal of the Stock Yard Company need not and will not, in connection with such separate appeal, duplicate any papers or documents transmitted by the Clerk in connection with the appeal of the railroad companies except to the extent the præcipe of the Stock Yard Company so requires.

Martin T. Manton, United States Circuit Judge.
Jno. C. Knox, Henry W. Goddard, United States District Judges.

Dated November 14, 1934.

[File endorsement omitted.]

[fols. 162-164] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 165] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO TRANSMIT ORIGINAL NARRATIVE STATEMENT OF EVIDENCE

This cause came on to be heard, upon application of the petitioners, and it was

Ordered that the Clerk of this Court in transmitting the transcript of the record on the appeal of the petitioners herein be, and he hereby is, directed to include in said record instead of a transcript thereof the original narrative statement of the oral testimony taken before the Interstate Commerce Commission, duly approved and filed herein, and in certifying said record he shall indicate that said narrative is the original filed copy.

Dec. 22, 1934.

Manton, U. S. D. J.

[fol. 166] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES N. FIDDLER—Filed Dec. 22, 1934

STATE OF NEW YORK,
County of New York, ss:

Charles N. Fiddler, being duly sworn, deposes and says:

I am an attorney at law and managing clerk associated with Cravath, de Gersdorff, Swaine & Wood, counsel for the petitioners herein.

I am about to present to the clerk of this Court, for certification a transcript of the record on the appeal of the petitioners herein. By an order dated December 18, 1934, the narrative statement of the oral testimony taken before

the Interstate Commerce Commission was approved and said narrative statement has been duly filed with this court. Said filed copy of the narrative statement was the only copy made.

Wherefore, I respectfully pray that the annexed order be signed, pursuant to the United States Judicial Code, [fol. 167] Section 210 (28 U. S. C. A., sec. 47a), directing the clerk of this Court in preparing and transmitting the transcript of the record on the appeal of the petitioners herein, to include in said record instead of a transcript thereof, the original filed copy of said narrative statement and in certifying said record to indicate that said narrative is the original filed copy.

Charles N. Fiddler.

Sworn to before me this 22d day of December, 1934.

[File endorsement omitted.]

[fol. 168] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 169] In United States District Court for the Southern District of New York

Equity. No. 78-351

The Atchison, Topeka and Santa Fe Railway Company, et al., Petitioners,

vs.

The United States of America, et al., Defendants

Narrative Statement of Evidence—Filed Dec. 18, 1934

Be it remembered that on the 2nd day of October, A. D., 1934, before the Hon. Martin T. Manton, Circuit Judge, and the Hon. John C. Knox and the Hon. Henry W. Goddard, District Judges, this cause came on for final hearing upon the pleadings heretofore filed herein.

APPEARANCES

Frank H. Towner for petitioners.

Martin Conboy and Elmer B. Collins for United States of America.

Daniel W. Knowlton and J. Stanley Payne for Interstate Commerce Commission.

Nathan L. Miller, Harold J. Gallagher and Edward B. Boyne for Hygrade Food Products Corporation.

Charles E. Cotterill and Luther M. Walter for The Union Stock Yards and Transit Company of Chicago.

Whereupon a petition for intervention was presented on behalf of The Union Stock Yard and Transit Company of [fol. 170] Chicago, which petition was received and filed. Whereupon a petition for intervention on behalf of Hygrade Food Products Corporation was presented, which petition was received and filed.

Whereupon petitioners offered in evidence the entire record, including all testimony, exhibits and other evidence introduced on the hearing before the Interstate Commerce Commission in its Docket 24375, Hygrade Food Products Corporation vs. Atchison, Topeka & Santa Fe Railway Company, et al., the same being received in evidence and marked by the reporter as Petitioners' Exhibit 1. (The transcript of testimony taken before the Interstate Commerce Commission and included as part of Petitioners' Exhibit 1 has been reduced to narrative form and is incorporated in this statement of evidence under the heading "Narrative Statement of Evidence Before the Interstate Commerce Commission," which immediately follows. The exhibits introduced in the hearings before the Interstate Commerce Commission and numbered from 1 to 23, both inclusive, together with certain other exhibits supplied to the Interstate Commerce Commission after the close of the hearing before it, have been certified and transmitted separately as original exhibits to the Clerk of the Supreme Court.)

[fol. 171] **Narrative Statement of Evidence Before the Interstate Commerce Commission**

Before the Interstate Commerce Commission

Docket No. 24375

HYGRADE FOOD PRODUCTS CORPORATION

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

Before J. Edgar Smith

Chicago, Illinois, December 21, 1931.

APPEARANCES

Cyril J. Curran appearing for complainant, Hygrade Food Products Corporation.

Ralph M. Shaw and Frank H. Towner, appearing for Union Stock Yard and Transit Company.

R. D. Rynder and W. N. Strack, appearing for Omaha Packing Company.

R. D. Lynch appearing for the Atchison, Topeka & Santa Fe Railway Company.

P. F. Gault and S. H. Gillette appearing for the Chicago & North Western Railway Company.

E. Rigg appearing for the Chicago, Rock Island & Pacific Railway Company.

R. G. Raasch appearing for Illinois Central Railroad Company.

William W. Adams appearing for Hygrade Food Products Corporation.

D. P. Connell appearing for New York Central Lines.

E. W. Soergel, J. L. Brown and J. N. Davis appearing for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Frank H. Towner appearing for the Chicago & Alton Railroad and Chicago Great Western Railroad Company.

Hornblower, Miller, Miller & Boston appearing for complainant.

[fol. 172] Proceedings

Examiner Smith: The Interstate Commerce Commission has set for hearing at this time and place the complaint of the Hygrade Food Products Corporation versus The Atchison, Topeka & Santa Fe Railway Company, et al. (Tr. 5.) In this case it is alleged that the rates charged for the transportation of cattle, calves, hogs and sheep, in carloads from various points in the states of Nebraska, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas and Wisconsin to Union Stock Yards, Illinois, were and are unreasonable, unduly prejudicial to complainant, and unlawful (Tr. 6), in violation of Sections 1, 3, 6 and 15 of the Interstate Commerce Act. The Commission is asked to prescribe reasonable rates for the future and to award reparation.

Mr. Curran: There is also an allegation in the amended complaint of a Section 2 violation. The carriers contend that the applicable rate for the delivery of live stock in carloads to the Hygrade Food Products Corporation is the Chicago rate plus the Chicago switching charge of 2 cents per 100 pounds with a minimum of 60,000 pounds. Deliveries similar to those made to the Hygrade plant are also [fol. 173] made to the plant of the Omaha Packing Company on the Chicago rate plus $2.70 or $1.35 a car. Consequently, if the carriers are right, we are subjected to the payment of a charge in excess of that paid by the Omaha Packing Company to the extent the $12 exceeds the charge of $2.70 or $1.35. (Tr. 7.) Also, we are required to take delivery, if we do not pay this $12 charge, at the yards of the Union Stock Yard & Transit Company. We are subjected to a payment for so-called yardage at the plant of the Union Stock Yards which runs generally from $6 to $22 a car, as applied to the shipper of particular cars and particular kinds of live stock. That charge is not imposed upon the Omaha Packing Company because deliveries are made to the side track of that company. We allege a Section 2 violation with respect to that.

William W. Adams was thereupon called as a witness for complainant, and being duly sworn testified as follows:

I am Traffic Manager of the Hygrade Food Products Corporation, and have held that position about nine months.

(Tr. 8.) Before that I was Assistant Traffic Manager for the same company, and before that Assistant Traffic Manager for the Allied Packers, Incorporated, a firm which the Hygrade Company bought out in August, 1929. I have been in the employ of the Hygrade Company or its predecessor since July, 1920, and before then I was on the rate [fol. 174] desk at Sulzberger & Sons and Wilson & Company for three years. (Tr. 9.) I was also Assistant Traffic Manager of Reed Murdock Company for seven years, and for two years was in the local freight office of the Burlington Railroad at Rock Island, Illinois.

I am familiar with the general layout of the Union Stock Yards and the rails of the Chicago Junction Railway which serve it, and am also generally familiar with the operations of the Stock Yards in the reception, care and delivery of live stock.

The business of the Hygrade Company is the purchase of animals and slaughter in preparation for food purposes. We have one plant located at Detroit, one at Buffalo, one at Wheeling, and one at Chicago which is the one involved in this case. The Chicago plant is at 3830 South Morgan Street. (Tr. 10.)

The document handed me is a map of the Chicago Junction Railway, which shows the Hygrade plant marked 1 near the center of the map, and the Omaha Packing Company marked 2 in the upper center of the map.

(Said document was thereupon received in evidence as Complainant's Exhibit 1 and is certified to this court.)

The Hygrade plant, as shown on the map, is directly north of the stockyards, which are shown thereon at the corner of Halsted and 47th Streets, running north to Pershing Road. Between the plant and the stockyards is the [fol. 175] proposed extension of Pershing Road or 39th Street.

To explain generally the system of track which is shown in that part of the map (Exhibit 1), which is designated Union Stock Yards: The three heavy lines marked "Chicago Junction Railway" immediately south of the Hygrade plant (Tr. 11) are the tracks on which live stock is unloaded when received at the yards. The unloading chutes are adjacent to these tracks, and the holding pens are between that or south of the most southerly.

As to the connection between that system of tracks and the Hygrade plant, tracks run north from the most northerly of the three tracks on Racine Avenue to 38th Street, where they run east across Morgan Street. The two spurs shown just west of Morgan Street are those of the Hygrade Company extending southerly from the 38th Street track. That does not show all of the spurs leading to the Hygrade plant. There are branches from those two spurs and also two new spurs which will be shown on another exhibit. (Tr. 12.)

The Omaha Packing Company, shown on Exhibit 1, is on the Chicago, Burlington & Quincy Railroad, the tracks of which are shown coming in from Western Avenue to the Omaha Packing Company at 22nd and Halsted Street, south to the place I have marked 2 on the map.

The document shown me is a map of the property of the Hygrade Company showing in detail the tracks shown on Exhibit 1, and also the additional tracks referred to.

(Said document was thereupon received in evidence as Complainant's Exhibit 2 and is certified to this court.) (Tr. 13.)

[fol. 176] On the extreme left of Exhibit 2 are the tracks which do not appear upon Exhibit 1. They are used at the present time for storage purposes only. We propose to use them to unload live stock if we can get delivery at our plant. They are shown as 452 feet long with a crossing where our ice track lead comes in, which would have to be kept clear. Ten or twelve cars could be accommodated on each track, but we contemplate unloading only from the more easterly one. (Tr. 14.) The track shown on the right leading on from the upper left-hand corner of Exhibit 2 is our icing track where cars are placed for icing prior to loading. It is the next track to the right of the one which I have just described and runs down to a point marked Hair House Frame. The track just south of the two-story brick power house is our coal track where coal is unloaded. At the more northerly part we load tankage and fertilizer which is a product of our plant. The track which comes south but curves east is the provision track where edible products are loaded and unloaded at our shipping dock. (Tr. 15.) The shipping dock is marked "loading platform." The last three tracks I have mentioned are marked on Exhibit 2 as "switch tracks." The proposed Pershing

Road is immediately south of the plant and the stockyards is on the other side of Pershing Road. In the lower right-[fol. 177] hand corner of Exhibit 2 are the pens which we have for storage of live stock. They are marked "cattle and hog pens." We intend to construct permanent unloading platforms and pens adjacent to our contemplated unloading track which is the track marked "452 feet." (Tr. 16.)

The Hygrade Compay took possession of this property on August 24, 1929. Prior to then it was in the possession of the Allied Packing Company. The complaint in this case relates only to shipments of the Hygrade Company.

The document handed me is a detail map of the pens shown as cattle and hog pens on Exhibit 2.

(Said document was thereupon received in evidence as Complainant's Exhibit 3 and is certified to this court.) (Tr. 17.)

These pens are shown on Exhibit 2 in the lower right-hand corner, just north of Pershing Road. We have ample capacity for the storage of live stock at our plant on our own grounds. The capacity of the pens is 1,725 hogs, 690 cattle or 2,592 sheep. We can handle that number of either but not all together. (Tr. 18.) There are 22 pens. All of them will accommodate in every instance a deck of live stock and some of them two decks. Quite frequently hogs and sheep are loaded in double deck cars. (Tr. 19.)

Referring back to Exhibit No. 2, I will show how these pens could be reached from the unloading tracks for live stock which I have designated on the left of the Exhibit—the tracks marked "452 feet": Live stock would have been unloaded on this track and driven south of the Hair House, [fol. 178] south of the two buildings marked "Concrete Building" and "Frame Building," and south of the power house. There is a passageway through there which it was our intention to fence into a driveway connecting with the western gate of the runway between our present pens. It is not now fenced.

The pens in the plant can hold from 11 to 22 cars of live stock, depending on whether they are single or double deck. Cattle do not come in double deck cars.

We receive deliveries of dead freight at our plant. Carloads of salt are sometimes unloaded on our ice track and

sometimes on what is known as the provision lead (Tr. 20). Cars of products would be unloaded on the provision track adjacent to the loading platform.

As to outgoing shipments of dead freight, edible product is loaded on the switch track adjacent to the loading platform. Tankage and fertilizer are loaded on the northern end of the coal track adjacent to the fertilizer department building. Those tracks are adequate for all incoming and outgoing shipments of dead freight. We have never used tracks marked "452" for loading or unloading and they are now being used only as storage tracks. (Tr. 21.)

I am generally familiar with the plant operations at the Hygrade Food Products Corporation plant so that I can testify as to its capacity per killing, its present output, and the quantity of live stock received by the Hygrade Food Products Corporation, whether through consigned shipments or through purchases at the yards of the Union Stock Yards Company.

The document handed me is a statement showing the number of head of live stock received in direct shipments at the Chicago plant of the Hygrade Company from September 1, [fol. 179] 1929, to *to* August 31, 1931. By direct shipments I mean shipments which were consigned from points outside Chicago to the Hygrade Company and do not mean stock purchased at the yards of the Stock Yards Company. We have also purchased considerable quantities of live stock in the stockyards. These direct shipments were delivered to us in the Union Stock Yards.

(Said document was thereupon received in evidence as Complainant's Exhibit 4 and is certified to this court.) (Tr. 22.)

The first three columns of Exhibit 4 show the number of hogs received, the total per month, the highest number per day and the average per day. The next three columns show the same for cattle, and the last three columns the same for sheep. The capacity of the pens shown in Exhibit 3 is greater than the highest daily receipts shown in Exhibit 4 and is much in excess of the average receipts shown. Exhibit 4, however, only covers direct shipments. The killing capacity per day of the Hygrade plant is 2,000 hogs, 400 cattle, 350 sheep and 150 calves. All of these numbers could be killed on the same day. (Tr. 23) Our killing capacity

is greater than the highest number of direct shipments on any day as shown by Exhibit 4.

The document handed me is a statement of the number of carloads of live stock received at Chicago consigned di-
[fol. 180] rectly to the Hygrade Company between September 1, 1929, and August 31, 1931. They are shown by railroads.

(Said document was thereupon received in evidence as Complainant's Exhibit 5 and is certified to this court.)

Exhibit 5 covers the same shipments covered by Exhibit 4. (Tr. 24.) The Hygrade Company received shipments subject to this complaint for seven days in August, 1929, but in preparing these exhibits I took even months to make an even two years. There have been shipments which are also subject to this complaint since August 31, 1931. The shipments shown in Exhibit 5 were delivered in the pens of the Union Stock Yard and Transit Company. There were no deliveries of live stock at any time during the period covered by the complaint to the side track of the Hygrade Company.

As to livestock which we purchase on the yards of the Union Stock Yards Company, we receive unlimited free storage. We can leave such stock in the pens of the Stock Yards until such time as we are ready to kill it. (Tr. 25.) On such livestock our own storage is not required. Consequently these exhibits reflect the situation as it would be if we had received deliveries of livestock consigned to us at our own side track. About 5 per cent of the direct shipments received at the stockyards are driven directly to the killing floor and are not stored on our premises. The 5 per cent I have given includes purchases at the stockyards. I cannot tell what percentage it would be of straight shipments. (Tr. 26.)

[fol. 181] The document handed me is a statement of the cars of products and supplies delivered on the tracks of the Hygrade Company at Chicago on which the Chicago Junction Railway switching charge is absorbed by the railroads.

(Said document was thereupon received in evidence as Complainant's Exhibit 6 and is certified to this Court.)

No terminal charge was imposed upon any of the carload lots received as shown on Exhibit 6—no freight charges

were paid other than the straight Chicago rate. Some of these shipments were fresh meat. (Tr. 27). Probably one or two cars a month over the two years were fresh meat. We paid no switching charges on any of the cars covered by Exhibit No. 6. The exhibit covers only cars brought in from outside the Chicago District moving on line haul rates. (Tr. 28). In addition, we receive cars originating in the Chicago Switching District on which there is one switch charge, but Exhibit 6 does not include those cars. Exhibit 6 covers the period September 1, 1929 to August 31, 1931, for the same reasons as the previous exhibits.

The document handed me is a statement of the cars of product shipped from the Hygrade plant at Chicago during the same two years on which the Chicago Junction Railway switching charge was absorbed by the line haul carriers. The exhibit does not include any cars in local switch-
[fol. 182] ing movement on which we would pay a switching charge. Switching charges were paid on the cars shown in the document but were absorbed by the line haul carriers. (Tr. 29) They were not paid by the Hygrade Company.

(Said document was thereupon received in evidence as Complainant's Exhibit 7 and is certified to this Court.)

The shipments on Exhibit 7 consisted of all classes of meat products, such as lard, casings and some hides.

I am distributing Exhibit 8.

(Said document was thereupon received in evidence as Complainant's Exhibit 8 and is certified to this Court.) (Tr. 30.)

Exhibit 8 shows typical cars of products or supplies received by the Hygrade Company at Chicago, showing date shipped, origin, car number and initial, the carrier delivering the shipment to the Chicago Junction, commodity, weight, rate, charges and the Chicago Junction switching charges. The shipments shown are representative movements to the Hygrade Company plant and show what would be shown by the same statistics on all cars covered by Exhibit 7. In the extreme right-hand column the highest figure shown is $15.80. (Tr. 31). That is the Chicago Junction Railway switching charge which is absorbed by the line haul carriers. The variation in amount results from varia-
[fol. 183] tion in weight. The switching charge is subject to

a 60,000 pound minimum. Those switching charges were not paid by the Hygrade Company. The last two items of Exhibit 8 are shipments of fresh meat which are representative of such movements. Fresh meat is shipped into our plant for handling in the same manner as the products of animals slaughtered there. (Tr. 32). The only difference is that in the latter case we have the slaughtering in addition to the other processes. After the slaughtering is completed, the fresh meat purchased and that slaughtered is co-mingled and is sent out and sold on the same terms and basis.

Exhibit 9 is now being distributed.

(Said document was thereupon received in evidence as Complainant's Exhibit 9 and is certified to this court.)

Exhibit 9 shows eight typical cars of product shipped from our plant to points outside the Chicago Switching District, showing dates shipped, destination, car number and initial, initial carrier, commodity, weight, rate, freight charges and the Chicago Junction switching charge which is absorbed by the line haul carriers. (Tr. 33). The shipments shown are typical of all outbound shipments. The last column shows the Chicago Junction Railway switching charges which in this exhibit was $12 a car in all cases and was absorbed by the line haul carriers. The charges paid by us are shown in the next to the last column headed [fol. 184] "Charges".

Exhibit 10 is now being distributed.

(Said document was thereupon received in evidence as Complainant's Exhibit 10 and is certified to this court.)

Exhibit 10 shows eight typical cars of live stock billed direct to the Hygrade Company at Chicago on which delivery was made in the Union Stock Yards. The exhibit shows the date shipped, origin, car number and initial, delivering carrier, commodity, weight, rate, freight charges and trackage charges of the Chicago Junction which is absorbed by the carriers. (Tr. 34). All of these shipments were delivered at the yards. The points of origin shown in the second column from the left are typical points from which we receive live stock. The exhibit reflects what would be shown if we showed the facts as to all consigned shipments of live stock. All of the charges shown in the last

column were paid by the line haul carriers. The next to the last column shows the charges we paid. (Tr. 35). In the case of the first item the amount of $90.36, shown in the next to the last column, is the freight charges from Omaha to Chicago, based on 25,100 pounds at a rate of 36 cents. The $2.70 item is the terminal charge at Chicago as provided in Galligan's I. C. C. No. 182. The 69 cents is the unabsorbed switching of the South Omaha Terminal Railway. The item of $93.75 is what we actually paid on that shipment. The $2 item is trackage charge of the Chicago Junction which it receives for allowing the road [fol. 185] haul carrier to move the cars over its tracks.

To explain the method by which shipments of live stock are delivered to the Union Stock Yard & Transit Company: They are brought by the road haul carriers and placed at the unloading chutes of the Union Stock Yard & Transit Company (Tr. 36) on the rails of the Chicago Junction Railway. They are then unloaded by employees of the Stock Yards Company and driven from the unloading chutes to the holding pens.

The $2 trackage charge was imposed with respect to all shipments shown on Exhibit 10, and was less than the $2.70 per car we paid except on the last car where there was a $4 trackage charge. Stock received from eastern lines is subject to a terminal charge of $1.35 and that received from western carriers, to a charge of $2.70. On this exhibit all the carriers were western carriers.

In shipping a carload of live stock the shipper receives from the initial carrier a live stock contract on which is a receipt for the product shipped, showing the consignee, route, description of product, and in some instances the rate (Tr. 37) and any additional charges that may have accrued. When the stock arrives at destination the charges are collected by the Union Stock Yard & Transit Company for the account of the carriers on a freight bill issued by the Stock Yards Company, which carries its yardage charges in addition to the freight charges. The live stock contract is the equivalent of the bill of lading but applies only on live freight.

The document handed me is a copy of a freight bill of [fol. 186] the Union Stock Yard & Transit Company on a car delivered to us on October 6, 1931. We receive such bills on all our shipments of live stock delivered at the yards.

Under the heading "Freight Charge Analysis" in the lower left-hand corner of the bill is shown the car number, rate, weight, freight charges, terminal charge, and in this case the 69-cent switching charge representing the unabsorbed portion of the South Omaha Terminal Railway switching charge of $1.82. (R. 38.)

(Said document was thereupon received in evidence as Complainant's Exhibit 11 and is certified to this court.)

On this exhibit the charge of $85.68, in the block at the lower left-hand corner, is imposed under C. B. & Q. tariff I. C. C. No. 17477. The $2.70 item is charged under Galligan's tariff I. C. C. 182. I haven't the tariff reference for the South Omaha Terminal Railway charge of $1.82 but the absorption of $1.13 is under C. B. & Q. tariff I. C. C. 15625. That is the total of $89.07 shown in the upper right-hand corner in the second column from the right. (Tr. 39). The item of 7 cents which appears below the $89.07 item in the second column is not filed with the Commission but covers fire insurance on the hogs while in the yards of the Stock Yards Company.

As to the item of $6.24 which appears immediately below, there is no tariff on file with the Interstate Commerce Commission covering the yardage charge of 12c a head. This yardage is a charge imposed by the Union Stock Yard & Transit Company to cover the delivery of the stock to us after it has been unloaded from the cars. As to what service is performed for that charge, in some instances the hogs are driven by employees of the Stock Yard Company from [fol. 187] the unloading chutes to the holding pens, where they have access to water. At that point they are held under lock and key until delivery is made to our employees, who drive them from those pens. In other instances, our own employees accept delivery at the unloading chutes, drive the animals direct to the scales and from the scales to our plant. (Tr. 40). The latter procedure is followed in about 15 percent of the direct shipments. Eighty-five percent of the direct shipments are put in holding pens where we accept delivery later, and in 15 percent of the cases the Hygrade Company take delivery at the unloading chute. The charge is the same in both cases. When animals are placed in holding pens by stockyards employees, I do not think there is any other service rendered than that I

mentioned. If such animals are fed or bedded we pay an additional charge for that. It is not covered by the yardage charge. (Tr. 41). After the delivery of the stock to us either at the chutes or in the holding pens, our men drive the stock to the scales where they are weighed by the weighmaster of the Stock Yards Company. Our men then drive the animals from the scales to our plant. No other service is performed by Stock Yards employees after weighing. We receive a scale ticket showing the weight. We furnish a copy of it to the Railroad Company for the purpose of assessing freight charges. The railroad companies do not receive this information directly from the Stock Yards Company, we give it to them. Freight charges are assessed on the basis of the weight found. (Tr. 42).

[fol. 188] The yardage charges vary with the number of head and kind of animals. On cattle it is 35 cents per head, calves 25 cents per head, hogs 12 cents per head and sheep 8 cents per head. These charges have been the same during the period covered by the complaint. On ordinary shipments the charge per carload would vary from $6 or even often less than $6. In some instances it is as high as $22 or $23 a car. The higher charge would apply on double deck cars of sheep. A single-deck car of hogs may come in with as few as 24 or 25 hogs, which would make roughly $3 yardage charge, but in a double-deck car as many as 110, which would make a yardage charge of $13.20 per car. The cattle average close to 28 or 29 a car, which would make an average yardage charge of about $10 per car. Sheep in double-deck cars run 250 or over, which at 8 cents per head would make the charge $20 or over per car. (Tr. 43).

No service is performed by the Stock Yards employees after weighing. After the weighing the stock are driven directly to our plant for slaughter. Prior to weighing and after the live stock are placed in the so-called holding pens, we are allowed unlimited storage. As to whether we ever have occasion to make use of that privilege: On animals arriving Saturday morning or Sunday, they would ordinarily be held over until Monday, but in most cases we take immediate delivery to save expenses of holding them there and feeding them. We pay extra for feeding.

As to whether the charges imposed for feeding by the Stock Yards people are in reasonable consistency with the

prevailing market prices for the different kinds of feed: The Stock Yards Company charge at present for corn is $1.20 a bushel, for hay $35 per ton and for straw $27 a [fol. 189] ton. (Tr. 44). Yesterday the cash price for corn at Chicago varied from 36 to 41½ cents per bushel as against $1.20. Hay varies from $9 to $18 a ton as against $35 a ton collected by the Yards Company. The market prices I have given are on a carload basis.

Exam. Smith: Before we get too deep into this, has the Commission any jurisdiction over those prices?

Mr. Towner: The Stock Yards Company has filed an answer in this case denying the jurisdiction of the Commission and setting up that the yardage service for which yardage charges and feed prices are collected (Tr. 45) are contained in tariffs filed with the Secretary of Agriculture who is now investigating them. I doubt the jurisdiction of the Interstate Commerce Commission to concurrently investigate them.

The Witness: Feed at the stockyards is supplied by stockyards employees to keep the cattle going while we leave them in the yards.

Examiner Smith: I do not think I would go any further than that.

Mr. Curran: We are not making any complaint of these charges. We merely offer them for the purpose of showing we have a strong incentive to remove live stock as quickly as possible from the yards. (Tr. 46).

The Witness: Generally we get our live stock out of the yards into our plant within six hours of arrival. The rates and charges covered by the freight bills presented by the Stock Yards Company are paid by check sent to the office of [fol. 190] the Union Stock Yard & Transit Company. A number of bills are usually paid at the same time. This bill is typical of all bills which we receive covering all the different shipments which are the subject of this complaint. Galligan's Tariff I. C. C. 182 covers the terminal charge and the basis for delivery at the platforms of the Union Stock Yard & Transit Company. (Tr. 47). It does not cover the whole period of the complaint but was preceded by Galligan's tariff I. C. C. 122. Page 76 of tariff 182 and I think page 86 of tariff 122 contains the provisions with respect to terminal charges. (Tr. 48).

Examiner Smith: The defendants do not desire copies of these?

Mr. Towner: What are they?

Examiner Smith: Merely sheets of the tariff.

Mr. Towner: If they are in the record I would like to have copies.

Mr. Curran: We want the whole tariff in for reference.

Mr. Towner: I have no objection to that. (Tr. 49).

The Witness: There is no substantial difference between the two tariffs, I. C. C. 182 and I. C. C. 122, one of which is 20-S and other is 20-R. Page 76 of tariff 182 is headed "Basis for rates to and from facilities located on the Chicago Junction Railway." It is shown as rate basis 6 [fol. 191] in the left hand column, and shows the basis for freight charges which will apply to or from line haul carriers from or to facilities on the Chicago Junction Railway. The first two columns cover freight traffic other than live stock and the last three columns cover live stock. The heading over the last three columns is shown as "Live stock from or to (as noted) industries; chutes or sidings of the Union Stock Yard & Transit Company at Union Stock Yards." (Tr. 50). The Union Stock Yards is a sub-station of Chicago. It has nothing to do with the Union Stock Yard & Transit Company except that the Union Stock Yards & Transit Company is located at Union Stock Yards.

Dead freight in carload and trap cars comes under rate basis 1, shown on page 73 as the Chicago rates subject to a minimum of $19 per car or a minimum of 3 cents per hundred pounds with a minimum carload charge of $19. There is no terminal charge applying to shipments of dead freight. Live stock is shown as rate basis 5, plus a terminal charge of $2.70 or $1.35 a car, depending on whether an eastern or western road is delivering carrier. Rate basis 5 is shown on page 75 as the Chicago rate, so this would be the Chicago rate plus the terminal charge. (Tr. 51).

[fol. 192] I do not know the reason for the difference in the terminal charges of $2.70 and $1.35. The $1.35 rate applies on eastern lines and the $2.70 on the western lines. The $2 trackage charge shown on one of my exhibits is not in the tariff—it is in the nature of a division and is paid by the delivering carrier to the Chicago Junction Railway. We pay the Chicago rate plus $2.70 or $1.35 a car. The unloading is paid for by the carrier. It is provided in the last column, at page 76 of the tariff, that the carriers will pay the Union Stock Yard & Transit Company $1 per car

for unloading live stock into suitable pens at the stockyards. (Tr. 52). There is no provision for payment of unloading charges on deliveries at pens on the Chicago Junction which are not the yards of the Stock Yards Company. The Omaha Packing Company does not pay the yardage charges of the Stock Yards Company, as it receives delivery direct at its plant without going through the Stock Yards Company. The Omaha Packing Company pays the Chicago rate plus $2.70 a car on shipments from the west. On shipments from the east they pay the Chicago rate without any terminal charge. That is provided in Galligan's tariff I. C. C. 182, on page 39, index 356, note reference 61. The Hygrade Company is an industry on the rails of the Chicago Junction Railway. (Tr. 53). It is shown as such in the directory of industries published in Galligan's Tariff I. C. C. 197.

[fol. 193] Mr. Curran: May I ask the Examiner that all of these tariff references be regarded as incorporated in the record in the absence of objection by other counsel?

Exam. Smith: Well, as I understand, you have referred to those tariffs. Now, the tariffs themselves are not incorporated in the record, and you do not mean exactly what you say there.

You have the reference to them, and you can use that reference as you are advised in your brief.

Mr. Curran: I want to have them introduced as evidence in this case.

Exam. Smith: No objection to that.

Mr. Connell: With the understanding he identifies the item and pages.

Exam. Smith: He is doing that fairly well so far.

By Mr. Curran:

Q. Is the Union Stock Yards & Transit Company an industry on the Chicago Junction Railway?

A. Yes, sir.

Q. Will you give us the tariff reference for that?

A. That would be listed in the same tariff, I. C. C. Number 197, Galligan's. (Tr. 54.)

Q. Have you the item number?

A. No, but they are shown here in I. C. C. Number 182—I am wrong, this is the Union Stock Yards shown in here. I have not the item number on 197.

Q. Can you give us the tariff references which will show us more completely what is meant by the Union Stock Yards as distinguished from Union Stock Yards & Transit Company?

A. Union Stock Yards is listed in Galligan's I. C. C. Number 182, as a station in Chicago—in the Chicago Switch-[fol. 194] ing District, Item 1490 on page 70.

Q. Will you show us what those items are?

A. It is shown as a station on the Chicago Junction Railway, and refers to Index Numbers 413 to 434 inclusive. 413 is on page number 39; 434 is on page 40. It includes the different locations in the Union Stock Yards.

Q. What are those locations as shown by the tariff?

A. Halsted Street District; Leavitt Street District; State Line District; House Number 6; East 47th Street District; Hoyne Avenue District; Damen Avenue District; West End District; and Middle District.

Q. In which one of those districts at the Union Stock Yards is the Hygrade Food Products Corporation plant located?

A. In the State Line District.

Q. And can you give us a reference to the Trunk Line tariffs of those trunk lines which concur in 20-R and 20-S, or I. C. C. Number 182 or 122? (Tr. 55.)

A. Yes, sir, I have a list of them here and will read them into the record with the appropriate page number:

Chicago & Alton I. C. C. Tariff No. A-2016, Item 65, page 9, and A-1929, Item 15, page 21.

Chicago Great Western Tariff I. C. C. No. 5256, Item 70, page 31.

Chicago & Eastern Illinois Tariff I. C. C. No. 91, Note 11, page 9.

Chicago, Rock Island & Pacific Tariff I. C. C. No. 11982, Item 455, page 17.

Chicago, Milwaukee, St. Paul & Pacific Tariffs I. C. C. No. B-6081, Item 80, page 49 and B-5866, Item 45, page 76.

Supplement 5 to Illinois Central Tariff I. C. C. No. A-10355, page 2.

[fol. 195] Chicago, St. Paul, Minneapolis & Omaha Tariff I. C. C. No. 4647, Rule 10, page 21.

Chicago & North Western Tariffs I. C. C. No. 9976, Rule 2, page 23 (Tr. 56) and No. 9788, page 15.

Atchison, Topeka & Santa Fe Tariff I. C. C. No. 10680, Rule 201, page 37.

Chicago, Burlington & Quincy Tariffs I. C. C. No. 17682, Item 400, page 16 and No. 17678, Item 36, page 14.

Supplement No. 5 to Wabash Railway Tariff I. C. C. No. 6554, Item 30-A, page 3.

Illinois Central Tariff I. C. C. No. A-10759, Rule 85, page 21.

Michigan Central Tariff I. C. C. No. 5865, Rule 2, page 12.

New York, Chicago & St. Louis Tariff I. C. C. No. 4878, Note 30, page 18.

New York Central Tariff I. C. C. No. L-S-1605, Section 1, page 19.

Pennsylvania Tariff I. C. C. No. 396, Item 90, page 16.

C. C. C. & St. L. Tariff I. C. C. No. 8563, Item 18, page 18 and No. 8552, Item 7, page 3.

C. & O. Tariff I. C. C. No. 11125, Rule 14, page 16.

Chicago, Indianapolis & Louisville Tariff I. C. C. No. 4448, Note 5, page 8. (Tr. 57.)

All the roads named *named* participate in Galligan's Tariff 20-R and 20-S and were subject to the provisions thereof together with their connections upon the lines of which shipments may have been originated. We have requested that deliveries of live stock be made to us upon our private siding.

I now offer Exhibit No. 12.

(Said document was thereupon received in evidence as Complainant's Exhibit 12 and is certified to this court.)

Exhibit 12 is a photostatic copy of a live stock contract issued at Sioux Falls, South Dakota, in September, 1930, [fol. 196] which was endorsed "Do not go into U. S. Yards Chicago, Illinois." We endeavored to arrange for delivery of this stock at our plant and had the live stock contracts issued accordingly. (Tr. 58.) We did this in other instances. We did it in connection with 22 cars from various points. This contract is typical of the contract in the other instances. We did it in 22 instances only.

Exhibit 13 is being distributed.

(Said document was thereupon received in evidence as Complainant's Exhibit 13 and is certified to this court.)

Exhibit 13 shows the 22 cars which we endeavored to bring into our plant for delivery on our own rails instead of into the Stock Yards Company's pens. (Tr. 59.) It shows the date of shipments, origins, car numbers and initials, route, and commodity, which in all cases was hogs, and the endorsement which was shown on each contract. The endorsements all indicated that the shipments were to be brought to our plant. Besides these 22 instances, in the case of consigned live stock, the Hygrade Company is named as consignee. Dead freight so consigned is never delivered to the Stock Yards Company.

Q. Why did you make these particular demands with these particular endorsements, which went beyond what was perhaps necessary in order to secure delivery at your siding?

A. We wanted to make it specific to the carriers that we desired the live stock delivered at our plant and not in the yards of the Union Stock Yards & Transit Company.

None of these cars were placed on our track. They were taken directly to the Union Stock Yards and unloaded and placed in pens there. We were notified we could get the stock or leave it. (Tr. 60.) After it was taken to the [fol. 197] stockyards it was placed in holding pens by the Stock Yards Company without our authorization or consent. It was unloaded by the Yards Company at its platform where it had been taken, in most instances by the Chicago & North Western; in one instance by the Illinois Central. After they had been unloaded without our consent we removed the shipments from the pens of the Stock Yards Company and brought them to our plant. Eventually we had to pay the yardage charges. We first paid the bills after eliminating the Yardage charge (Tr. 61) but the Stock Yards Company notified us that they would hold our stock until the yardage charge was paid on the other stock. So, under compulsion, we paid the charge.

Q. Did you make any other special demands after that date for delivery to your plant outside of having your live stock contracts name you as the consignee?

A. No, sir, we made no further attempt after that. We had endeavored to arrange it by telephone prior to this, and there has been some conversation with the road haul carriers, but nothing was put in writing until these contracts were made.

By Mr. Towner:

Q. What road haul carriers?

A. The Chicago & Northwestern particularly. They are the line that carries most of the live stock into Chicago.

Q. Do you mind telling us to whom you talked?

A. Mr. McNie.

By Mr. Curran:

Q. Why did you not make any further demands after these particular ones were made?

A. It appeared to be useless. At that time we started to draw up our complaint.

We were never given delivery of any live stock covered by this complaint on our private siding either before or [fol. 198] after. (Tr. 62.) The reason assigned by the carriers for failure to make the requested delivery is contained in a letter from Mr. Kemp dated September 20, which stated that before he could deliver live stock at our siding we would have to assure him that the Chicago rate would be paid plus the $12 switching charge.

Exhibit 14 is now being distributed.

(Said document was thereupon received in evidence as Complainant's Exhibit 14 and is certified to this court.)

[fol. 199] Exhibit 14 is a copy of Mr. Kemp's letter of September 20. (Tr. 63.)

By Mr. Curran:

Q. Now, Mr. Kemp in the second paragraph of his letter sets forth the provision of what he says is Galligan's 20-S, page 28 Item 65, and that provides the carload freight for delivery on a terminal carrier within the Chicago District, will not be delivered and so forth, until all charges assessed and so forth, are paid or satisfactorily arranged for. (Tr. 63.)

Have you made any arrangement for payment of such charges?

A. We have a bond filed with Mr. Kemp's office. At the time this shipment moved bond was for $2000, and guaranteed payment of all lawful freight charges within 96 hours. We have a similar bond on file with the Yards Company covering the payment of charges to it. The switching charge referred to by Mr. Kemp is covered by Chicago

Junction Railway Tariff I. C. C. No. C-J-44, Item 140, on page 6.

Q. Will you now state whether you actually ever refused to pay the switching charge which Mr. Kemp said applied to this shipment?

A. We told Mr. Kemp's office that we would pay the lawful tariff charge, but he was unwilling to accept that assurance as sufficient to justify the delivery of these cars at our plant. (Tr. 64.) I did not personally tell that to Mr. Kemp. (Tr. 65.) Mr. Norris, to whom Kemp's letter was addressed, was my predecessor as Traffic Manager of the Hygrade Company. At that time I was Assistant Traffic Manager and familiar with the negotiations and these 22 cars. I was with Mr. Norris when he talked to Mr. Kemp and heard what he said. He said he would pay the lawful tariff charge. That is all he said. He would not promise [fol. 200] to pay the $12 charge in addition to the Chicago rate. He declined to pay it, to Kemp's personal satisfaction. (Tr. 66.) We have a copy of the bond on file with Kemp, which we will furnish for the record within 10 days. It has been increased since that time. (Tr. 67.)

We did not receive any notification in advance that these [fol. 201] particular cars of live stock had arrived at the stockyards. We knew of course when they were due because they move on schedule trains. The notice we received was given us by the Stock Yards Company only after arrival. It was not notice given by the carriers who were responsible for the movement.

Live stock are sometimes injured after delivery in the yards of the Stock Yards Company. The line haul carrier pays the damage. (Tr. 68.)

The next exhibit is No. 15.

(Said document was thereupon received in evidenced as Complainant's Exhibit 15 and is certified to this court.)

Exhibit 15 is a photostatic copy of claim Number 19852, filed by the Hygrade Company with the Burlington Railroad for one dead hog and seven crippled hogs in a shipment from South St. Paul on September 11, 1931. (Tr. 69.) The dead hog was dead before arrival at Chicago. It was so reported by the Stock Yards Company. The seven crippled hogs were crippled after being unloaded. This was also reported to us by the Stock Yards Company.

That report will be our next exhibit. The damage for the crippled hogs is shown as $56. That is figured at the weight of the hogs at an arbitrary amount of 2¢ per pound, which is settled by the carriers on the basis of 50%. (Tr. 70.)

The next exhibit is No. 16.

(Said document was thereupon received in evidence as Complainant's Exhibit 16 and is certified to this court.)

Exhibit 16 is a letter from the Freight Claim Agent of the Stock Yards Company, advising that in the cars [fol. 202] shown in our claim Number 19852, 365 hogs were unloaded and yarded; that there was one dead hog at the time of delivery, and that when 358 hogs were received 7 cripples were left back for drayage. That is the letter which I conclude that the Yards Company admitted that the hogs became crippled after unloading. The car numbers shown in the letter correspond with some of the car numbers shown on Exhibit 15. Where animals are crippled or die before arrival at the stockyards, the ordinary basis of settlement is 50 percent. (Tr. 71.) We are notified by our drivers of the hogs that they receive in each shipment. They also notify us of any deads or cripples, and whether the deads or cripples were in that condition when unloaded from the cars. They secure that information from employees of the Stock Yards. We had no notification as to these particular shipments that there were cripples before arrival. The dead was shown as having been dead when unloaded.

The next document is Exhibit 17.

(Said document was thereupon received in evidence as Complainant's Exhibit 17 and is certified to this court.)

Exhibit 17 is a photostatic copy of the C. B. & Q. check Number 17121, given us in payment of three claims, one of which was claim Number 19852 on which they paid us $37. (Tr. 72.) Quite frequently live stock dies or is injured after arrival. As to whether it happens in every instance or in any instance that the Stock Yards pays for such damage: We have never been able to induce them to pay. The line haul carrier pays for the damage. We have never been able to induce the Stock Yards Company to pay. The transaction reflected by Exhibits 15, 16, and 17 is typical of what happens in the case of injuries or crippling of live stock after arrival.

The Hygrade Company and the Omaha Packing compete with each other in selling products of the same nature in [fol. 203] Chicago. I have seen their product and ours in the same store. Those products might be hams, bacon, sausage, or canned meat. (Tr. 73.) There is no charge in any tariff on file with the Commission for the storage of live stock after delivery. Live stock is not subject to demurrage. There is no restriction as to the length of time we can store at the stockyards if we see fit to do so, and certainly no limitation in the tariffs on file with the Commission. We requested permission from the Yards Company to take photostatics of chutes and pens but were refused, the Stock Yards Company saying that they had advice from their attorneys. (Tr. 74.)

Mr. Towner: I told them not to let you take the pictures because a picture showing the entire layout cannot successfully be made. (Tr. 75.) I agreed to have made and produce a blue-print and I have done this. (Tr. 76.)

The Witness: Boyd's Tariff I. C. C. No. A-2217, Item 460, page 27, provides that hoof weight where obtainable will be used for collection of freight charges. Item 480, Rule 9, Section A, on page 30, provides that when weights are obtained for the assessment of freight charges no charge will be made by the carrier for the service. (Tr. 77.) That provision only applies on the western lines, but there is a similar tariff of the eastern lines in regard to the first rule. I have not checked as to the second rule. The carriers [fol. 204] impose no charge for weighing under any tariff filed with the Commission and relating to the present issue, but the tariff I have mentioned provides a charge for the second weighing. (Tr. 78.) We never have a second weighing of live stock at the stockyards on shipments consigned to us. No freight charges on live stock delivered to us are prepaid. Payment is always made after delivery of the stock at Chicago. The freight bill (our Exhibit 11) is sent to us by the Stock Yards Company, is checked and payment made by voucher to the Stock Yards Company. The Hygrade Company actually paid and bore the charges on all shipments of live stock covered by this complaint, whether imposed under I. C. C. tariff or otherwise, as shown on the freight bills (Tr. 79.) I know that this is true because I personally O. K. the bills for payment if I am in Chicago; otherwise they are approved in my department, and I know

the terms upon which the live stock is purchased. I know the freight charges are paid because I receive the paid bills after they are sent back from the Stock Yards Company.

[fol. 205] Cross-examination:

We do not now receive direct deliveries of live stock at the Chicago Junction Railway track serving our plant. The Chicago Junction is the only railroad that can give us the service. The Hygrade Company has operated the plant since August, 1929. I think the Allied Packers bought it in May, 1922. Prior to May, 1922 it was operated as an independent plant. (Tr. 80.) The tracks of the Chicago Junction have always been in the plant except the two on the west side which were built, I think, in 1924. All of the present tracks of the Chicago Junction serving our plant, except the two on the west side, are used for purposes which would prevent their use for the unloading of live stock in any quantity. We might unload a single car or two cars. For practical purposes they are not available for such unloading, and the two tracks on the west side are the ones we would use if we had such delivery of live stock. Those two tracks would hold ten or twelve cars each. (Tr. 81.) We propose to use only one track because it would be difficult to unload from the westerly track. Our present track facilities for unloading of live stock are, therefore, limited to one track which will hold 10 or 12 cars at a time, and that is all we would have unless we made some change in the location of the tracks. We do not now have an unloading chute but we did have. We have an alleyway through which the stock could be driven from the one track [fol. 206] to our pens, but it has never been fenced. (Tr. 82.) Stock is driven through the streets of Chicago. I have seen them going past our plant every day. To receive live stock at our plant in the volume we have received it in the past couple of years, on direct shipments, we would have to have some means of unloading the animals from the car. That would mean a permanent construction, which is what we contemplated. (Tr. 83.) It would be practically necessary to also have fenced alleys. We haven't those facilities at this time. At the time the live stock was billed in, we had a portable unloading chute which was on wheels. If we had all of our cars on direct delivery to our plant, I think our present pens would be sufficient. I think

we could handle those animals without delaying our handling of animals bought on the market at the yards.

We have no scales now at our Chicago plant. We have a set at Buffalo that is not in use and it was packed ready to move to Chicago. (Tr. 84.) We propose to install scales at the Chicago plant. That would have to be done. We would not expect the railroad to weigh the live stock on our scales. We would do it ourselves. We do not do it now.

I am not familiar with the situation of the Omaha Packing Company's plant and do not know what its facilities are. The question of taking care of our needs for facilities is a matter for our New York officials to determine. (Tr. 85.) So far as I know, it hasn't been determined yet.

[fol. 207] We complain of the assessment of the yardage charges of the Stock Yards Company on live stock consigned direct to our plant and received through the Stock Yards Company but do not complain of the charge on cattle which we buy in the stockyards. We do not pay any yardage charge directly on cattle we buy at the Stock Yards but we certainly pay it when we pay for the cattle. We do not complain of that charge because the cattle are afforded further service such as sales service. (Tr. 86) The Yards Company furnishes sales pens for the commission men to sell the cattle in and they are moved from one point to another. The aniamls are driven when necessary, are furnished pen service when necessary, and are furnished water.

Eighty-five per cent of the shipments consigned direct to us, all of which come through the stockyards, are yarded at the stockyards. We complain of the collection of the yardage on these animals because 90 per cent of them could be taken immediately to our plant if there was any advantage in so doing. (Tr. 87). We have this complaint on the portion of our direct shipments which are yarded at the present time. They get the pen service and are also driven from the chutes to the pens but we drive them from the pens to our plant. They get substantially the same service but in lesser degree than the animals bought at the stockyards. As to why we complain of the payment of the yardage on the one and not on the other: The other cattle do not come in to us direct. All we are asking is free delivery on live stock billed to us direct. We can get along without the yardage service on all such live stock. (Tr. 88). About 15 per cent of the animals consigned to us at the stockyards

are driven by us from the unloading chute direct to our [fol. 208] plant. We take them through the alleys of the Stock Yards Company and through an elevated driveway, over the pens and away from traffic. There is also a tunnel under the proposed Pershing Road. I do not know who owns the tunnel, but all the rest are facilities of the Stock Yards Company. We use those facilities coming for stock. (Tr. 89) That is true of animals which we drive from the unloading chute direct to our plant. The other 85 per cent of such animals are transferred by stockyard employees to other pens and are given the necessary attention.

Q. What you want then is a delivery without the payment of any excess charge?

A. Without the payment of anything over the freight charge on file with the Commission.

Q. Didn't you know, or do you know, that you can get that now on the line of every western line in Chicago?

A. At a point where it would be feasible to move it to our plant?

Q. I am not speaking of that. You can now get the delivery, can you not?

A. We can get delivery on the Chicago & Northwestern at Proviso.

[fol. 209] Q. Exactly. Why don't you take that?

A. Too far away, outside the city limits.

Q. It is impractical, is it not?

A. Yes, sir.

Q. What you want then is not delivery on the line of the line (Tr. 90) haul carrier without additional charge, but you want delivery at the place you have seen fit to locate your plant without additional charge, isn't that it?

A. Yes, sir.

Q. Now, what you say with respect to the Chicago & Northwestern is also true of the other western lines, is it not?

A. Some of them. The Chicago, Milwaukee, St. Paul & Pacific has delivery at Galewood; also outside the City limits.

Q. But all in the Chicago District, the Chicago Switching District?

A. In the Chicago Switching District, yes.

Q. I am advised that Galewood is not outside the city limits. Do you know?

A. I thought it was. It is north of Oak Park.

Q. Well, that is the Milwaukee point?

A. It is within the switching district.

Q. All of these points are within the switching district, are they not?

[fol. 210] A. Yes, sir.

Q. Isn't that true as a general proposition on the lines of the other carriers that haul your stock into Chicago? Most of it comes in on the Chicago & Northwestern?

A. Most of it comes in on the Chicago & Northwestern.

Q. Isn't that generally true of the others that haul your inbound stock? (Tr. 91.)

A. Most of them have unloading pens on the outskirts of the city, or just outside.

Q. And those are the points to which the Chicago rates apply on live stock are they not?

A. Not according to the switching tariff.

Q. Where else could they apply?

A. To the Union Stock Yards.

Q. But there is a difference in the charge, is there not?

A. $2.70.

Q. Exactly.

A. Yes, sir.

Q. Now, the flat Chicago rate of these railroads applies to these points you have spoken of, does it not?

A. Applies to every connection with the Chicago Junction Railway.

[fol. 211] Q. You can get delivery at all of those points with no charge except the Chicago rate, can you not?

A. Yes. We could get delivery at Clinton, Iowa for less than the Chicago rate.

Q. You think that is comparable, do you?

A. Just about as convenient. (Tr. 92.)

[fol. 212] During all the time that our plant has been operated by the Hygrade Company and its predecessor, the Allied Packers, these deliveries have been made at the stockyards. In 1925 the Allied Packers attempted to make arrangements for plant delivery by requesting it, but had no stock billed that way. We first started billing it for direct delivery in September, 1930. (Tr. 93). I know it was talked over in various cases. We first attempted to bill stuff that way in September, 1930, but it was talked over in the fall

of 1929. The shipments shown on Exhibit 12 are not those referred to in Exhibit 14. Exhibit 14 was written in connection with other shipments shown on Exhibit 13. We continued billing cars in this way until the end of September when we cancelled our instructions for that style of billing. (Tr. 94). I do not think we ever absolutely refused to pay the $12 switching charge of the Chicago Junction Railway. Mr. Kemp asked us for assurance that it would be paid and Mr. Norris told him he would pay the correct tariff charge. I think in all probability that Kemp told us that this de-[fol. 213] livery of the live stock under discussion would be made at your plant; that the Chicago Junction demanded prepayment of its charges and that he (Kemp) did not have the money with which to pay them and it would be necessary for us to prepay them, and that our company definitely refused to pay on the ground that the Chicago rate applied, although I did not hear any such conversation. I don't know definitely but I think that was very likely what happened. (Tr. 95) I still think the Chicago rate, plus $2.70 a car, applies to our plant. I have referred to the tariffs which I think makes that rate applicable. I claim that if we paid the switching charge of the Junction we would be overcharged. (Tr. 96)

Examiner Smith: As I see the complainant's case, as far as it has gone at the present time, it is immaterial to the complainant whether the Stock Yards arrangement is good, bad or indifferent.

You do not want their service. You want the service at your own plant, is that correct?

Mr. Curran: We wish that, and we also wish to have free delivery at the Stock Yards, because the Stock Yards in making delivery is performing a transportation service, and we complain of several violations of the Act because of the fact that this yardage charge is imposed in the first place—

Exam. Smith: Now, just one minute. I think I have your position clear. It is immaterial in either event whether their service is good, bad or indifferent. What you want is to be relieved of that charge, is that it?

Mr. Curran: That is correct.

Exam. Smith: So the photographs would do you no good in any instance.

Mr. Curran: What we wanted to show by the photographs is (Tr. 97) the facilities for unloading. Showing that what [fol. 214] we have is in effect a live stock depot which performs transportation service. We are going to attempt to show that without the photographs, but our feeling was that if we had the pictures of these unloading chutes, of the holding pens and of the scales that we could make a complete picture of what the process is on the Yards.

We are going to do that—we have not finished with that, but we won't be able to do it as well as if we had photographs of the things we were going to describe.

Exam. Smith: Let me see if I follow you there. The live stock in some manner gets into the car that is adapted for its destination. When it gets to the destination it must be unloaded, and to unload it certain facilities are necessary. Isn't that correct?

Mr. Curran: That is correct.

Exam. Smith: And that is all there is to it. Now, they have approximately the correct facilities at the Union Stock Yards, haven't they?

Mr. Curran: That is correct.

Exam. Smith: And you claim that is part of the transportation?

Mr. Curran: Let me refer to page 76 of Galligan's Tariff 20-S, I. C. C. Number 182, in which this statement is made: (Tr. 98)

"Carriers named in first column will pay the Union Stock Yards & Transit Company the charges shown below for unloading live stock consigned for delivery at the Union Stock Yards, Chicago, Illinois, into suitable pens at said Stock Yards"—

Now, there is a question of tariff construction as to what that means.

Mr. Towner: The tariff provides the meaning for it. The same column down below.

[fol. 215] Mr. Curran: If you will permit me to finish. One of the issues it seems to me in this case, is whether the pen in which this live stock is unloaded is suitable pen within the meaning of paragraph 5 of Section 15 of the Act, which would clearly prevail as to the requirement of the law over any tariff provision. One of the issues is the question of the pens in which cattle are unloaded, whether they are suitable pens.

Mr. Towner: I would like to interject there this thought. The complaint alleges that these yardage charges at the Stock Yards Company, as Mr. Curran states, are part of the transportation.

The Yards Company denies that, and denies the jurisdiction of the Commission over those charges.

Now, if the complainant is willing to abandon that part of the complaint, my position with respect to this case would (Tr. 99) change very substantially, but I do not understand that they are willing to do that, and they would have to do that, Mr. Examiner, to produce the situation you have in mind. That is correct, is it not, Mr. Curran?

Mr. Curran: We are not withdrawing any part of our complaint, that is true.

Mr. Towner: That is what I meant.

Exam. Smith: I had hoped that I could help the case a little bit. I withdraw that hope.

Mr. Towner: I wish you could too.

Mr. Connell: Mr. Curran, I understood you to say that you wanted not only direct delivery of the cars to the plant of the Hygrade Food Products Corporation, but also free delivery of live stock through the U. S. Yards.

[fol. 216] Mr. Curran: We have no complaint against the terminal charge of $2.70 or $1.35. We do complain against the yardage charge which is clearly a transportation service in our opinion and which is not covered by any tariff on file with the Interstate Commerce Commission; and which, if added to the applicable rate, which we do not attack, that is the Chicago rate, plus the terminal charge of $2.70 and $1.35, that rate becomes unreasonable.

We further claim that it is a violation of Sections 2 (Tr. 100) and 3, because of the service rendered to the Omaha Packing Company.

Mr. Connell: No, I am trying to find out what would satisfy your complaint. Whether direct delivery at the plant of the Hygrade Food Products Corporation would satisfy the complaint.

Mr. Curran: That would satisfy one aspect of the complaint.

Mr. Connell: At the same time you want both services. That is, direct delivery at the plant at the Chicago rate plus $2.70 and $1.35; you also want free delivery service at the Union Stock Yards at the same rates.

Mr. Curran: At the same rates.

Exam. Smith: Well, I think it is plainer anyway now.

Mr. Connell: I was just wondering if there is anything else they want.

[fol. 217] The Witness: The eastern line tariff providing for the use of destination hoof weights in assessing freight charges is Jones Tariff I. C. C. No. 2248, Item 4185, page 297. (Tr. 101.)

We probably use most of our storage pens every day to some extent under our present method of handling. We buy a great deal more stock on the market of the stockyards than we have consigned to us direct. We sometimes leave that stock in the yards after we buy it, and sometimes drive it direct from the buy. Our present pens are not used to capacity or anywhere near it every day, but probably every pen is used for some time during the day. All of our pens are available for the storage of all classes of live stock. (Tr. 102.) We do not keep cattle and hogs in the same pen at the same time, so that if we had one kind of live stock in the pen, it would not be available for the use of any other kind of live stock at the same time, even though not being used to capacity. The figures I gave represented the capacity of the pens. After the pens have been used for one kind of animal they would probably require cleaning before being used for another kind. The capacity I testified to figured filling all of the pens at once with one kind of animal. If we had so many hogs that we had to have hogs in each pen, we would have no pen space for another class of animal at that time. (Tr. 103). With respect to the shipments consigned direct to our company, [fol. 218] we were not willing to accept delivery of these shipments and pay the $12 switching charge of the Chicago Junction. We do not want direct delivery at our plant if we have to pay the Chicago Junction charge. That is my understanding of it. The bond I spoke of guaranteeing the payment of all lawful charges within 96 hours was on file with Mr. Kemp, the Stock Yards District Agent, and ran to the Stock Yards District Agency. (Tr. 104). It is made out to the Chicago, Rock Island & Pacific Railroad Company, Chicago Junction Railway Company, headed Stock Yards District Agency, and lists the various railroads for which Kemp is agent.

Dealing with Exhibits numbered 15, 16 and 17, I made

claim against the C. B. & Q. Railroad on information furnished to our drivers by the Yards Company. As to how it happened that the check in settlement of our claim (Exhibit 17) is dated prior to Exhibit 16, the letter in which we were advised as to the amount of the damage: We secured this letter from Mr. Wheeler with the intention of using it here as an exhibit. We had the information but not in the form of an exhibit. (Tr. 105). The stockyards people told our hog drivers that the crippled hogs became crippled after unloading, and the hog drivers noted it on the back of the scale ticket. I don't know who told them that nor who in the employ of the Stock Yards Company made the statement. The Stock Yards Company makes a record of the animals that are unloaded. I have not seen that record with respect to this shipment. That record is made as the animals come out of the car and would correctly show their condition. (Tr. 106). If there were any cripples it should be shown on that record. An unloading certificate was sent to us with Exhibit 16. I rely on the letter as repre-
[fol. 219] senting a confession by the Stock Yards Company as to the time when the animals became crippled. So far as I know, we have never filed a claim with the Stock Yards Company fo. damage to animals, and I do not know whether anybody else does so. (Tr. 107). As to whether many claims are filed with the Stock Yards Company, I do not know.

The situation with respect to delivery of live stock to us by the Stock Yards Company is reasonably identical as it is with respect to every other packing plant in the same neighborhood but there is some difference in the distances they have to drive. So far as I know, they all pay the same charges, including Swift, Armour and Wilson. So far as I know, we are in the same situation. (Tr. 108). All of those companies have plants immediately adjacent to the yards or within the square mile ordinarily spoken of as the yards. We are just outside, being across the street, Wilson is within and Armour and Swift are inside. I should think the Swift and Armour plants would be closer to the Yards than we but Wilson would be farther away. I can't say for certain about Armour because I don't know just where the hogs are driven to. (Tr. 109). On shipments to all these plants, the handling charges paid and everything else is identical with what we get.

Exhibit 1 was furnished to us by Mr. O'Brien of the Chicago Junction Railway, and so far as I know it is absolutely correct. Our plant is designated on that map by circle reference Number 1. (Tr. 110). That plant is served [fol. 220] only by the Chicago Junction Railway, no other line getting into the property. The nearest other line is a mile or two miles away, and maybe more. The two tracks extending southward from another track extending eastward on Exhibit 1 are shown on Exhibit 2. They are the two tracks I previously described as our ice track and our coal track, but the branch extending to the loading platform is not shown. (Tr. 111). Exhibit 2 shows the track running south to the Hair House. The tracks we propose to use for unloading are not shown on Exhibit 1. I think they were built in 1924 when the branch of the Chicago River was filled up. They were on the property when the Hygrade Company bought out the Allied Packers in August, 1929. (Tr. 112). Since the Allied Packers acquired the tracks, they have been used for storage of refrigerator cars, some of which were owned by the Independent Packing Company. The tracks will hold approximately 20 cars, but I think we have had as many as 24 cars there. We have to have some tracks for storage purposes. (Tr. 113). If we used these tracks for unloading live stock we would be dependent on the Chicago Junction Railway for storage space, but we keep our private refrigerator cars moving pretty steadily.

Our cattle and hog pens are shown at the lower righthand corner of Exhibit 2 and are shown more in detail on Exhibit 3. The slaughter house is immediately north of the pens and probably five floors up. The pens are adjacent to the slaughter house and are used for storing stock until it is taken to the slaughtering floor. (Tr. 114). They would still have to be used for that purpose if used to [fol. 221] some extent for storage. In driving animals from the two tracks shown on the left of Exhibit 2 to the pens we would have to cross two switch tracks, but the switch tracks are not used that far south.

The Omaha Packing Company plant is shown in Exhibit 1 by Circle Number 2. It is located on the Chicago, Burlington & Quincy and no other line. It is not served by the Chicago Junction. (Tr. 115). It is about two miles from the Chicago Junction across the Chicago River. I said

that under my interpretation of Galligan's tariff the Union Stock Yards as referred to therein was a sub-station of Chicago. The Exchange Building at the stockyards is on Exchange Avenue, and on Exhibit 1 I put the words "Union Stock Yards" at about that location. (Tr. 116). The stockyards runs from the unloading chutes south of Pershing Road to 47th Street. The tariff shows the stock yards in Zone 1, which is the inner zone located on the Chicago Junction, a terminal carrier.

The Union Stock Yards is referred to in Galligan's Tariff 182 on page 70, Index No. 1490. The Tariff shows Union Stock Yards, Illinois, is in Zone 1, that is, the inner Zone, and is located on the Chicago Junction, a terminal carrier. For rates from or to points on the various road-haul carriers, the Tariff refers to Index Nos. 413 to 434 which are on pages 39 and 40. All of these Index Numbers are headed Chicago, Illinois, (Tr. 117). They are all districts on the Chicago Junction.

When we get weights on live stock from the Stock Yards Company we furnish the weights to the Western Weighing Association who furnish them to Mr. Kemp for the purpose of billing freight. We use the scale tickets to check our freight bills. We do not settle with the consignor on the basis of those weights. We settle with the consignor on basis of the invoice weight. That would be the weight at the point of origin.

[fol. 222] Cattle load 28 to 30 to a car, making a weight of 28,000 to 30,000 pounds. The minimum number is 22. (Tr. 118). A car usually loads over the minimum with cattle.

We generally move stock from the stockyards within six hours after arrival, except that stock received on Saturday and Sunday would be held over until Monday. With the exception of such stock, we seldom allow any to remain in the yards very long. I don't know where the Omaha Packing Company gets its live stock. (Tr. 119). I don't know why we let our stock stay in the stockyards at all unless it is that we are not ready for it at the plant. Generally, we drive enough animals the night before to start the killing gang in the morning, holding the animals over night in our own pens. The animals that we do leave in the stockyards are left there for our convenience because we

have enough on hand to work on. It doesn't cost us anything to leave them. We take the animals from the stockyards to our holding pens shown in Exhibit 3. (Tr. 120).

The notation on Exhibit 13 "Do not deliver U. S. Yards" was a failure on the part of the shipper to carry out our instructions. They consider the U. S. Yards the same as the Union Stock Yard & Transit Company. We instructed them to bill the animals to our plant at 3830 Morgan Street, "Do not go into Union Stock Yards & Transit Company." I will furnish a copy of those instructions in the morning.

[fol. 223] Redirect examination.

(Tr. 121). I know of no tariff provision restricting the length of time during which we can keep animals at the stockyards of the Union Stock Yards & Transit Company.

We only intended to use one of the tracks shown in our Exhibit 2 because that would be enough to take care of the cars of live stock we were getting in at the time. I think our Exhibit 4 indicates that. The highest number of hogs we received in any day was 1,311, the highest number of cattle 188, and the highest number of sheep 282. They came in different months over different railroads and at different times of day. (Tr. 122.) I think space for ten cars would accommodate any delivery the Chicago Junction would make to us under present operations. We could use both tracks. We could unload on the west side of the track and drive the animals around the cars on the other tracks, or we could bridge the space between the tracks and unload through the cars spotted on the more easterly track. We did not increase our facilities for unloading and storage in 1930 because the carrier refused to spot the cars on our track at the Chicago rate. We had the blue-prints prepared, but if we had constructed the facilities they would have been idle for two or three years until this case was decided and would have been in the way of our other operations in the way of storing cars. (Tr. 123). When we made our demand we obtained a portable un-[fol. 224] loading chute which would have been sufficient until there was permanent construction. Fences about runways are convenient for driving livestock but not necessary. Our entire property is fenced.

Deliveries are made to other packers at approximately the point designated as the location of the Hygrade Food

Products Plant on Exhibit 1, which are conveyed for considerable distances through the open streets. Deliveries are made to the Illinois Packing Company, which is located on 38th Street, and the animals are driven north on Morgan Street to 38th. Deliveries are made to the Burnett Packing Company, which is at the easterly end of the Chicago Junction Spur, from which our branch tracks lead and hogs are driven on 38th Place to their pens. (Tr. 124). This is all outside of the stockyards. If we drove the animals from our temporary facilities through our own yard we would be entirely on our own property and we would not have difficulty driving through the streets. The weighing at the stockyards is done by the Union Stock Yard & Transit Company weighmaster, but we can take the animals without having them weighed if we wish. We had available scales which could have been installed if we got direct deliveries. They are in Buffalo now not being used. (Tr. 125). We think we now have sufficient facilities to take care of any demands which we have made.

Recross-examination:

We did not add to our facilities because it would not have been as convenient in storing cars. (Tr. 126). The cars would not have been as easily accessible from the outside for painting or cleaning. We have painted cars on those tracks, but I do not think we have cleaned them. The two tracks are sort of general utility tracks. (Tr. 127). It [fol. 225] would be possible for us to make both tracks on the west side of our plant available for unloading if necessary. We could not then use the tracks for storage purposes and would have to use other tracks of the Chicago Junction. We now use the tracks for some car repairing and we would have to send that out to be done. I think one track holding 10 cars would be sufficient for our purposes. (Tr. 128). If 15 cars of live stock came in consigned to us, one track would not be sufficient if they came on one drag and could not have taken them in one setting. There would have to be two settings. The same would be true as to 13 cars inbound on February 19, 1931. The Chicago Junction would have to hold some cars while the number you could take were set in, unloaded, and the empties taken out. Then another train would have to come in and set the balance. (Tr. 129). If during the time some cars were

being held it became necessary to unload the stock for feed and water to avoid law violation, that would be an operating matter for the railroads and would not disturb us. We have capacity in excess of 13 and 15 cars if we see fit to use it. In an emergency we could put about two cars on each of the two tracks on the extreme right adjacent to the cattle and hog pens. The extreme westerly limits of our property are indicated on Exhibit 2 by the fence. (Tr. 130). There is about 56.85 feet between the tracks on the [fol. 226] left and the westerly limits of our property. I do not know what the figure 187 applies to. (Tr. 131). I think we could unload a couple of cars on each of the two tracks east of the power house at the south end of the tracks. We seldom have a car on the more easterly track marked "switch track." We generally have a car on the Power House track which would have to be taken out to put cars of stock on the south end of either track. (Tr. 132). Our plant generally starts at 7 o'clock in the morning and we work until we get through. We have a night foreman so we could take delivery of live stock when the plant is closed.

G. A. Hoffelder was thereupon called as a witness for complainant, and being duly sworn testified as follows:

I am Assistant General Freight Agent of the Chicago, Burlington & Quincy Railroad Company. (Tr. 134). As I understand it, I was to appear at the hearing and testify generally that there had been a movement of live stock switched from Western Avenue to the plant of the Omaha Packing Company located on our rails at O'Neil and Halsted Streets, which live stock we received from connecting lines at Chicago. This live stock originates in a number [fol. 227] of states but most of it comes from Illinois, Wisconsin and contiguous states west of the Mississippi River. (Tr. 135). The movements in question were principally over the lines of the western carriers. (Tr. 138). There were some shipments from Minnesota, Iowa, Missouri and Nebraska. I cannot say specifically what western defendants participated in the movements, but I would say that there has been a movement from stations served by virtually all of the western roads. (Tr. 139.)

Cross examination.

The Chicago Junction Railway did not participate in the transportation of any of these shipments to the Omaha Company's plant. I don't see how it could participate in a movement to that plant. I said that the Chicago, Burlington & Quincy delivered these cars which were delivered to it by other carriers bringing them into the Chicago District.

Examiner Smith: The Chicago Junction is merely a local terminal line, is it not?

Mr. Connell: It is. (Tr. 140).

Examiner Smith: But it does not engage in line haul?

Mr. Connell: That is correct.

[fol. 228] Augustus Downing was thereupon called as a witness for complainant, and being duly sworn testified as follows:

I have been engineer for the Hygrade Company for about six years. (Tr. 141). Before then I was Supervising Engineer for the Allied Packers and Engineer for John Morrell & Company. I have charge of construction work, maintenance and general engineering work for the Hygrade Company. I am generally familiar with the construction found at the Stock Yards Company.

The map shown me purports to show a section of the Union Stock Yards. It was in our files but I don't know where it came from and do not know who prepared it. (Tr. 142). I checked the map a few days ago and it is substantially the same as the present construction at the Stockyards. I did not check all the figures, just checked it generally. I only went over the trackage with the map in my hand. (Tr. 143).

Mr. Towner: I have a correct map here and you can have it now.

Mr. Curran: That will answer all my purposes. (Tr. 144).

(Said map was thereupon received in evidence as Complainant's Exhibit 18 and is certified to this court.) (Tr. 145).

On this map the tracks at the extreme northerly part of [fol. 229] the quarter of the map opposite the American

Sand & Gravel Company are switch tracks of the Chicago Junction Railway Company. (Tr. 146) Immediately south of those tracks the unloading chutes for unloading livestock are shown on the map in the form of a "Y" or in the form of tuning forks set in square cubicles. The square cubicles are chute pens. The unloading platform is just north of the cubicles about parallel with the rails and adjacent to the chutes. (Tr. 147). The blocks marked "incline" shown on the map south of the unloading chutes are inclines for passing livestock from the unloading chutes up to the second story holding pens. The square blocks immediately south of the inclines, in the space between the northerly and southerly tracks, are spaces to represent holding pens. The word "incline" immediately south of that is the same as the other "incline." There is another series of unloading pens on the tracks to the south. The south is toward Exchange Street. The same situation is shown with respect to the track which is south of the second series of unloading platforms and also with respect to the next line of tracks which runs east and west on the map. (Tr. 148). I observed the unloading chutes and am familiar with that type of construction. They are all about the same size. I prepared a diagram showing an unloading chute and the character of the facilities it contains.

(Said document was thereupon received in evidence as Complainant's Exhibit 19 and is certified to this court.)

[fol. 230] (Tr. 149). Exhibit 19 shows the plan of the unloading chutes with the unloading platform and a reproduction of a car on the railroad tracks. Livestock are driven from the car across the unloading platform down an incline and into either one of the unloading chutes. The gate at the bottom is thrown to one side or the other to divert the stock into one chute or other. The cross hatch shown on the unloading platform toward the center is the hinged section of the floor of the platform which is raised to accommodate the upper deck of a double deck car. The incline leads down into the unloading chutes on either side of the incline. (Tr. 150). At the bottom there is a gate which can be swung to shut off one division from the other. I would call those divisions "unloading chutes" but I did not see the word marked on any fence in the stockyards. When the stock moves down the incline they go into one

of these chutes or pens. (Tr. 151). The movement of the livestock is from these pens into the storage pens. I stepped off the chute pens, and I should say they are about 20 by 30 feet.

Cross-examination.

The chute pens are large enough to hold one deck of livestock but not large enough to hold two decks. I did not see two decks in one of them. The number of hogs in a double deck car would depend on the weight of the hogs. (Tr. 152). [fol. 231] You can usually load 120 hogs in a double deck car and 160 sheep. Between the unloading chutes or chute pens and the holding pens there is an alleyway. The unloading chutes open into the alleyway. (Tr. 152).

Edward E. Hubbard was thereupon called as a witness for complainant, and being duly sworn testified as follows:

I am assistant to the head hog buyer of the Hygrade Company and have been for three years. Prior to that I was in the same position with the Allied Packers for 5 years and the Frye Packing Company for 9 years. I am on the property of the Union Stock Yard & Transit Company daily from 7 A. M. until trading has stopped. (Tr. 154). I am familiar with the general layout and methods of operation in the yards particularly with respect to unloading and delivery. Stock arriving at the yards is delivered by the carriers to the platform of the Stock Yards Company where it is unloaded by the stockyards men into chutes. It it then taken by the Stock Yards Company employees to holding pens on the main floor. Sometimes stock is delivered to sales pens on the main floor. The Hygrade Company takes delivery at the unloading chute 5 per cent to 10 per cent of the time. (Tr. 155). Where delivery is not taken, the stockyards people move the animals to an unload- [fol. 232] ing pen. On Exhibit 18 any of the pens between the two lines of trackage south of the Chicago River and between the following two lines of trackage are holding pens. The livestock is taken from the chute by the Yard Company, and placed in holding pens under Stock Yard Company locks. Watering is supposed to be done by the stockyards employees. A portion of the pens contain water

troughs. (Tr. 156). Some of the hog pens have no water but all of the sheep pens are supposed to have. In the holding pens for cattle there are feed racks. The cattle holding pens are open but those for hogs and sheep are covered. The unloading chutes merely have space for temporary holding quarters with no water facilities except a sprinkler system which protects against heat in hot weather. I have never seen any water troughs and the animals cannot drink unless they drink off the floor. The unloading chutes are not covered but the holding pens for hogs and sheep are covered. (Tr. 157). The unloading chute is small compared to a lot of holding pens. The holding pens are made for care of live stock. Chutes are merely places for loading and unloading live stock. The unloading chute could hold a single deck of any class of live stock, but not more than a [fol. 233] single deck. The holding pens will hold from 8 hogs up to 400 or 500 hogs.

The reason for the variation in size of the holding pens is that often times odd lots of hogs are purchased by buyers which do not require the large amount of space occupied, and also truck hogs have to be taken care of and naturally smaller pens utilize less space. (Tr. 158). The holding pens are considerably larger as a rule than the unloading chutes.

After the animals are brought to the holding pen, our men report to the stockyards office and get information as to the location of the live stock which is posted on a bulletin. The key man for the Yards Company unlocks and delivers each pen of our stock to our man who takes it to the scale in the closest direction to our plant, where it is weighed. On Exhibit 18 there are two scales on the upper deck of the hog house know as C-4 and C-5 east of Laurel Street. (Tr. 159). Usually the hog scales are upstairs, and I think the sheep scales are also. The cattle scales are on the ground floor. The weighing is done by a stockyards man who punches a ticket showing the weight and counts the number of hogs. Our man drives the hogs to the edge of the yards where they are again counted by a stockyards employee. From there they are taken to our packing house. (Tr. 160). On Exhibit 18 the receiving pens for hogs are south of the extreme north line of tracks and between the second line of tracks and third line of tracks. The holding pens for cattle are between Exchange Avenue and the first line of

[fol. 234] tracks north of it. They are immediately south of the hog pens. The sheep pens are west of Laurel Street and south of the last line of tracks between Exchange Avenue and what is shown on Exhibit 18 as D-4. (Tr. 161). Practically everything is unloaded on the three east and west lines of tracks shown in the north right-hand corner of the map, except possibly at times there is unloading on the tracks running north and south parallel to Halsted Street. The pens in the lower half of the lower hight-hand quarter of Exhibit 18 are sales pens for cattle. The sales pens for hogs are on the second floor south of the north line of tracks between the two adjacent lines of tracks. (Tr. 162). Sales pens are used for sales purposes only.

The sale is made in the following manner: The buyers are approached by commission men who ask what kind of stock they are looking for. Commission men look at the live stock and bid what they think the market value is. The Hygrade Company makes no sales on the Exchange. The commission men and yard traders are the only people who make sales. (Tr. 163). Yard traders are speculators who operate trying to make a margin on live stock. I do not know of any packer ever selling live stock on the yards. Usually stock is received during the night and delivered to us the following morning. We often hold stock over Saturday in the yards, but usually we take it a few hours after unloading. I do not believe the average delay would be over six hours the whole year around. (Tr. 164). I know of no case where we have had them held longer than two days. The [fol. 235] commission men and traders have particular parts of the yard assigned for their deliveries. (Tr. 165). Particular sections are allotted to designated commission firms to hold their sales. We have no allotted pens and I know of no other packer who does. Hogs are sometimes put into these assigned pens when consigned to the man who has the pens. Sheep are delivered directly to assigned pens. Cattle are handled like hogs, but they usually try to get them into the proper quarters. (Tr. 166). Sometimes the commission men have their own men at the chute in order to get their stock into the pens as quickly as possible, but if they do not have their men there, the Stock Yards Company puts the animals to the assigned holding pen. That would not be so in the case of hogs, but would be in the case of sheep and sometimes in the case of cattle. (Tr.

167). When cattle are delivered at the unloading chutes, it is necessary to drive the animals about half a mile to the pens assigned to commission men.

Exam. Smith: Now, let's see, is there any allegation of discrimination or prejudice as between you and the commission men?

Mr. Curran: No. sir; but we are indicating the service which is rendered the commission men which we do not receive and do not want.

Exam. Smith: Well, I am going to listen to it for a little while longer, but I do not see where this goes. The Stock Yards are over there, and it offers a certain service and performs a certain service. You say you do not want the services, and if you get them you want them free.

I have gotten that much out of it, and it does not make any difference to my mind—I may be all wrong as to the layout of the Stock Yards; unless you show it is absolutely inefficient.

They are out there and they say they serve you and they [fol. 236] say they serve others in the same way. Now, I do not care how those tracks lay. I have not seen any reason why I should be bothered whether they run east and west or north and south. (Tr. 168). They get cattle out of the cars some way, and they handle them and ultimately you get your cattle. The commission man gets his cattle. The other sale traders get their cattle.

I cannot see that this goes anywhere at all. I may be altogether wrong. I frequently am.

Mr. Curran: Well, I would like to make this statement for the record, and that is that the basis of our complaint is that the service which the Stock Yards Company renders for us is a service of delivery which is part of the transportation service, and that is all we want and all we require.

Now, the Stock Yards undertakes to do more than that in the case of some of its patrons, and sometimes it does more than that for us. As to these other patrons and ourselves, when we buy on the Yard we have no complaint to make of the Stock Yards charge. The purpose of this testimony was to show what this other service was as to which we make no complaint, for the purpose of distinguishing out situation in which we require one delivery. I think, however, I have covered all I wanted to cover in this presentation of it.

The Witness: The time required to drive live stock from the yards (Tr. 169) into our plant varies with the location of the live stock when we receive it from the Yards Company. It ranges between an hour and three-quarters to [fol. 237] carry a load across. We take three to five loads at one drive. They are taken over an overhead viaduct leading into the packing house and down through the subway where the river used to be. The time I have given is from the storage pens to our plant and varies from three-quarters of an hour to an hour or sometimes longer on hogs. That is the average per carload. (Tr. 170). We ordinarily drive five carloads over at a time but we only maintain three men to drive them. The time I speak of is from the time the stock is weighed to us to the packing house. The stock is counted three times. (Tr. 171).

We can tell whether the death or crippling of animals occurred prior to unloading because the Yards Company gives us a notice from their record. The men unloading furnish it, showing live stock crippled or dead in the cars. If the crippling occurs afterwards we get notice from the same source. The Yards Company notifies us that the stock is crippled when unloading or crippled in the chutes.

In case of a double deck of hogs, we have two weighings, one from each deck. (Tr. 172). Occasionally on cattle we have two weighings on one carload, but that happens very seldom in the case of consigned shipments. In the case of animals handled by commission men and traders, it frequently happens there is more than one weighing which is due to the fact that one carload may be sold to three or four men. This is done about 75 to 80 per cent of the time. That does not happen in our case except where the carload is [fol. 238] split as between upper and lower decks. Tr. 173).

Cross-examination.

Both sides of a receiving pen will hold a double deck, a deck in each side. It would be a disadvantage to me in the summer time not to have water in the unloading pens if I kept animals in those pens. (Tr. 174). We have kept stock in there for two or three hours with a spray over them before loading. In the case of unloading we have had times when the stock stayed there for an hour and a quarter, but I would not say that was frequent. I do not know that in the mornings stock cannot be kept in the unloading pens more

than two minutes. I know it takes longer than that to get them out of the pen. (Tr. 175). I would judge that from the farthest pen where we might receive cattle to our packing house would be a mile and a quarter. From the nearest pen it would be a half mile or three-quarters of a mile. Both the unloading pens and storage pens have cement or brick floors. The unloading pens are equipped with sprays. (Tr. 176). There are times when watering troughs are necessary in the unloading pens due to the slow movement of the stock. It would cause too much confusion if every one undertook to yard his stock to get them to water. The Stock Yards Company has to do it to avoid confusion. It would [fol. 239] be preferable to have water in the unloading pens to save the live stock from heat. (Tr. 177).

Benjamin B. Greer was thereupon called as a witness for complainant, and being duly sworn testified as follows:

I have had twenty-six years railroad experience with the Great Northern, Chicago, Burlington & Quincy, Chicago, Milwaukee, St. Paul & Pacific, and United States Railroad Administration. I was manager of the Milwaukee during the Railroad Administration and Vice President in charge of operations for the last five years up to 1925. In 1917 I was Vice President and General Manager of the Colorado & Southern. I was Superintendent, Assistant General Manager and Assistant to the Operating Vice President of the Burlington (Tr. 178) and had various positions in the Operating Department of the Great Northern. I became generally familiar with railroad operating problems in the Chicago Switching District, which is the District that constitutes Chicago delivery on freight for railroads entering Chicago. Since 1925, I was President of the New York Air Brake Company and kept in touch with the railroad situation. I have made certain examinations as to trackage and operating conditions in connections with this case.

[fol. 240] In connection with my experience, I became familiar with railroad operating problems within the Chicago switching district. The Chicago switching district is the district that constitutes Chicago delivery for freight for railroads entering Chicago.

Since 1925, I was President of the New York Air Brake Company, which makes airbrakes for railroads, and during

that period I kept in touch generally with the railroad situation.

I made certain examinations as to trackage and operating conditions in connection with this case. (Tr. 179). I examined the situation as to deliveries at the Hygrade plant and at the plant of the Omaha Packing Company. At the Omaha Company plant they have two unloading tracks with a platform between. The tracks hold about eleven cars apiece. It is a very nice layout. The situation at the Hygrade Company plant is as has been described here in the previous testimony and exhibits. (Tr. 180). I saw the track layout as it is shown in the exhibits which have been presented. At the Omaha Company plant the operation is simple enough after the Burlington gets to the plant with their transfers. They run through the congested territory in the so-called lumber district and have quite a operating problem to get down there and back. There are a lot of grade crossings. (Tr. 181). I am referring to the operation from the Burlington yard to the Omaha Packing Company plant. I found that the operating problems are not of the best either at the Hygrade or the Omaha plant. One is as bad as another. I think there would be no difference. The only difference in operating problems at the two plants would be that at the Omaha Packing plant the tail track room is longer and the operation consists of shoving cars right into the plant. (Tr. 182). At the Hygrade plant cars have to be pulled by the switch and shoved in from the tail track. It is not quite as simple as the Omaha plant situation but is not unsurmountable and is not unusual in Chicago. I am sure it exists in many cases in the Chicago District but cannot give you specific instances.

[fol. 241] Cross-examination.

When I say that cars would have to be pulled at the switch point, I mean that cars would have to be pulled in an easterly direction to Morgan Street and shoved in. They would have to be pulled in an easterly direction and pushed backward, westerly and southerly, down on the two tracks to the rest of the plant layout. It would be a double operation instead of a single operation. (Tr. 183.) I am talking about the two tracks 452 feet long. I do not understand that the track down past the power house is under consideration, but get-

ting into it would be quite a complicated operation. I would think it was almost impossible. (Tr. 184.) I have seen a great deal of the operation of live stock into Chicago. I was with the Chicago, Milwaukee, St. Paul & Pacific for six years and with the Chicago, Burlington & Quincy for nine years. I spent perhaps five years in Chicago. I was probably out to the stockyards district a dozen times in ten years. (Tr. 185) for purposes of general inspection of our operation. I have not gone over the tracks of the Chicago Junction in the stockyards district thoroughly, but I know in a general way what the layout is. It is very congested during the stock period, during the morning hours. (Tr. 186.) The Milwaukee handles stock direct to the unloading chutes with its own power and crews. We leave our rails at Franklin Park and operate over the Indiana Harbor to the Chicago [fol. 242] Junction and then over the Chicago Junction into the stockyards. I have been at the stockyards in the early morning hours when trains were coming in, and do not believe I have ever seen anything more congested during my experience at Chicago. (Tr. 187.) If a train had stopped before it got to the unloading chutes to set out some cars, it would have been quite a serious matter, as it would have delayed everything behind it. Sometimes we brought trains in on very short time under the 28-Hour Law. Had those trains stopped to set out cars, we might have violated the law and subjected ourselves to heavy penalties. All railroads make an effort to observe the law. (Tr. 188.) I have been over the tracks of the Chicago Junction in the locality of the Hygrade plant and the unloading tracks in the last month. On Exhibit 1, I observe the unloading tracks between the pens at the Hygrade plant. Exhibit 1 does not show all of the tracks. It is not large enough to show how the Milwaukee would bring trains into the Union Stock Yards as it does not cover the Indiana Harbor Belt Line which would be off to the left of the map. (Tr. 189.) I think we would come on to the map from the Indiana Harbor Belt in the lower left-hand corner. From a point six or eight miles from the stockyards the traffic goes through a very congested district, and any stops to switch out cars in the early morning hours would delay a great many trains under ordinary circumstance. That, I admit, would be a very serious matter.

[fol. 243] Redirect-examination.

(Tr. 190.) In my opinion, live stock would not be delivered to the Hygrade plant in the manner I have just described from the point of view of good operating practice.

I assume that stock for the Hygrade plant would be handled in transfers the same as stock for the Omaha Packing Company is handled, and would not be handled in stock trains to the stockyards. Under the present operation the Hygrade Company's stock is handled in stock trains to the unloading chutes, and it would be a difficult matter to switch out those individual cars. But the Hygrade Company's stock comes in in bunches in time freight trains; it does not come in in what we call pick-up stock trains. If that stock was not brought in in regular stock trains that go to the yards, there would have to be special runs which possibly would add to the congestion if it came in with the rest of the stock in the morning. (Tr. 191.) There is not as much of it as there is of the Omaha Packing Company stock, so the difficulties would not be as great. If three or four other packers in the same vicinity demanded the same service, that would be quite a problem. On the Milwaukee Railroad, if a live stock train came into the Bensonville yard with eight or ten cars for the Hygrade Company, those cars would have to be switched out. (Tr. 192.) The time this would take would depend on where the cars were. They are generally bunched. They come from one primary market to Chicago as a general proposition. If they are not bunched, they would have to be switched out the same as dead freight has to be switched out now for the Omaha plant. That all has to be switched out when delivered the same as we are talking about this stock. It would not be unreasonable to assume a half-hour delay in switching the trains. (Tr. 193.) It would depend on the length of the train, but ordinary stock trains on the Milwaukee have 80 or 90 cars of stock.

[fol. 244] After the cars were switched out they would be handled by transfer to the Chicago Junction and would be delivered at whatever yard the Chicago Junction said. Our engine would not take the cars to the Hygrade plant, as the Chicago Junction would be the terminal switching road. (Tr. 194.) The Chicago Junction would have to have an engine at the interchange yard to place the cars at the Hygrade

plant. That would all consume time. The operation would be entirely the same as on the Burlington Railroad to the Omaha plant. With respect to comparative congestion, there is a great deal of congestion at the Burlington yard at Western Avenue in the morning. That is where the Omaha stock is received by the Burlington from other roads. I do not believe the Milwaukee Railroad has any connection with the Chicago Junction other than through the Indiana Harbor Belt. (Tr. 195.) The Milwaukee has some trackage rights over the Pan-Handle that they could come there on but I do not believe there is any direct connection. I do not know whether the Pan-Handle route is used for taking live stock to the stockyards. It would probably be more congested than the Indiana Harbor Belt. Stock over that line would be handled from Western Avenue and would not go into Bensonville. (Tr. 196.) Stock from the Council Bluffs Division would go to Bensonville and would have to be pulled to a point east of Western Avenue and then back on the Pan-Handle tracks. We would have to do that or run [fol. 245] through the Union Station which we would not do very well. Live stock is a highly perishable commodity and it is desirable to get it off the rails as soon as possible. Dead freight can stand more than live stock (Tr. 197) but railroads now-a-days are trying to handle all traffic with the least possible delay. There is no criminal liability for delaying dead freight. The operating difficulties which have been brought out would exist on deliveries made to the Omaha plant, with variations in degree or kind. The same delays which I have mentioned are liable to occur at Western Avenue where the Milwaukee would deliver to the Burlington for delivery to the Omaha plant. Deliveries have been made to the Omaha plant as long as I can remember. (Tr. 198.)

Chicago, Illinois, December 22, 1931.

Leo S. Joseph was thereupon called as a witness for complainant, and being duly sworn testified as follows:

I am General Manager of the Hygrade Company, Chicago division, and supervise the sales in the Chicago district. I have become acquainted with the trade practices of the

Omaha Packing Company in Chicago. (Tr. 201.) Competition in sales exists between the Hygrade Company and the Omaha Company in that their salesmen cover the same sections of the City, and call on the same customers trying to sell the merchandise. We sell the same general class of meat products that the Omaha Company sells. A few of those products are smoked meats, fresh pork, lard, cooked specialties, and items of that description. (Tr. 202.)

[fol. 246] Cross-examination.

The Omaha Company is not the only company with which we compete. There is general competition here among all the packers. (Tr. 202.)

WILLIAM D. ADAMS, witness for complainant, having previously testified, was recalled and testified as follows:

Mr. Connell asked this morning that I furnish certain information relating to our Exhibit 16. That exhibit was a letter from Mr. Wheeler, Freight Claim Agent of the Union Stockyards, stating that one hog had been unloaded dead, and 7 hogs had been delivered crippled to us. The letter also stated that he enclosed an unloading certificate which was not furnished. I have the certificate here, and we can furnish photostatic copies within ten days if such copies are desired. (Tr. 203). The unloading certificate only shows the condition of the hogs when they were unloaded, not when they were delivered. [There was no request for copies.]

I was also requested to furnish a copy of four written instructions covering the billing of those hogs into Chicago. I have a mimeographed letter which we sent out on September 15th. The instructions prior to that were verbal.

Cross-examination.

The letter was sent out on September 15, 1930. (Tr. 204.) It relates to the shipments on Exhibit 13. Three shipments on Exhibit 13 were made after the date of the letter. The rest moved on verbal instructions. Apparently the shippers of those cars considered that "Union Stock-

yards" meant the same as Union Stockyards & Transit Company. That is the general understanding in the country. (Tr. 205.)

Exam. Smith: There is no necessity for filing the letter of September 15, 1930.

[fol. 247] Re Direct Examination.

The two tracks on our property used for storage purposes are leased at this time to the Mather Stock Car Company, which stores its cars there, doing light repairs and occasional painting jobs. Our cars are not stored there.

Re Cross-Examination.

Those tracks have been leased to the Mather Stock Car Company since January, 1931. They were not leased prior to that date but were vacant. (Tr. 206.)

Mr. Curran: I desire to introduce a certified copy of the charter of the Union Stockyards & Transit Company, which is certified upon a photostatic copy. It is almost illegible, and for that reason we went to the Session Laws of Illinois, for (Tr. 206) 1865, and found this in printed form. Copies of this Exhibit have been compared with the Session Laws, and it correctly represents what the charter would show if it were legible. For that reason I ask that the certified copy be accepted in evidence, and that the mimeographed copy be also accepted for the convenience of the Commission.

Exam. Smith: Is there any objection?

Mr. Towner: No objection. I do not know what it has to do with the case, but I will not take up any time with an objection.

Exam. Smith: The photostat will be Complainant's Exhibit Number 20 and the mimeographed copy, Number 21. There is nothing in Exhibit Number 21 that is not in Exhibit Number 20, is there?

Mr. Curran: Exhibit Number 21 is exactly the same as Exhibit Number 20.

(Said documents were thereupon received in evidence as Complainant's Exhibits 20 and 21 and are certified to this court.)

(Tr. 207.) Complainant rests.

[fol. 248] O. T. HENKLE was thereupon called as a witness for defendants, and being duly sworn testified as follows:

I live in Chicago and am Vice President and General Manager of The Union Stock Yard & Transit Company. I have direction of the operation of the property. I have been with the Company for 28 years and have been General Manager for about 15 years. I am familiar with the issues in this case. (Tr. 208.) The property of the Stock Yards Company is west of Halsted Street and between 35th Street and 47th Street, in Chicago. It has been occupied by the Yards Company for stockyards purposes since the organization of the Company. A history of the Stock Yards Company is given in the decision of the Supreme Court at 226 U. S. 286 and in the report of the Interstate Commerce Commission in the loading and unloading charge case, 52 I. C. C. 209. The Company started business under a special charter of the Legislature of Illinois dated February 13, 1865, the charter being issued to the present Company. Exhibits 20 and 21 are copies of the charter that was originally issued and is the present charter of the Company. (Tr. 209.) When the Company was incorporated, subscriptions were taken for $1,000,000 worth of stock of which $925,000 was subscribed by nine trunk line railroads reaching Chicago. Subsequently these railroads sold the stock in the open market, and for about 50 years no trunk line railroad has had any ownership interest in the Yards Company or control over its affairs.

As appears from the reports of the Supreme Court and the Commission, the Yards Company, under its charter, first constructed not only a stock yards but also a railroad. [fol. 249] This railroad was leased in 1897 for a term of 50 years to the Chicago & Indiana State Line Company. Under this lease the Yards Company received, as lessor of the railroad property owned by it, two-thirds of the profits derived by the lessee from the operation of the railroad. This lease was in effect at the time of the decision of the Supreme Court. After that decision the form of the lease was changed and the railroad property owned by the Yards Company was leased to the Chicago Junction Railway Company in perpetuity for a rental of $600,000 a year. This was the lease in effect at the time of the decision in 52 I. C. C. Since then the Yards Company's position has

been substantially changed. Under authority of the Commission granted in 71 I. C. C. 631 (Tr. 210) the railroad property owned by the Stock Yards Company and operated by the Chicago Junction Railway was, with the consent of the Yards Company, leased by the Chicago Junction Railway Company to the Chicago River & Indiana Railroad for 99 years and the stock of the Chicago River & Indiana Railroad was purchased by the New York Central Railroad. The lease to the Chicago River & Indiana also contained an option to extend the lease in perpetuity. Since this arrangement went into effect the Yards Company has been entirely divorced from any company engaged in the operation of a railroad. At the present time the stock of the Yards Company and of the Chicago Junction Railway is largely held by a holding company organized under the laws of New Jersey. The Yards Company still owns the railroad property formerly operated by the Chicago Junction, and the Chicago Junction is the lessor of that prop-
[fol. 250] erty to the Chicago River & Indiana. But neither the Yards Company, the Chicago Junction nor the holding company are operating a railroad or have any connection therewith or control thereover, directly or indirectly.

The only present activity of the Stock Yards Company is that of furnishing a loading, unloading, and stockyards service in connection with the shipping, receipt and delivery of live stock. Its activities with respect to live stock fall into two distinct categories. The first activity is loading and unloading live stock for the railroads which haul such stock to and from the stock yards. (Tr. 211.) From 1867 until the decision in 226 U. S. 286, this charge was 50 cents a car for loading and 25 cents a car for unloading, and was not published in any tariff filed by the Yards Company with anybody. It was paid to the Yards Company by the railroads. In the decision referred to, the Supreme Court held that the Stock Yards Company was a common carrier and thereafter its loading and unloading charges were incorporated in tariffs filed by the Yards Company with the Interstate Commerce Commission but were not changed in amount. In 1917 these charges were increased by 25 cents, which led to the Loading and Unloading Charge Cases before the Commission reported at 52 I. C. C. 209 and 58 I. C. C. 164. Afterwards they were increased to $1 per car for loading and unloading under authority

granted at 61 I. C. C. 223. They have remained at that figure ever since, and since the decision of the Supreme Court have been contained in tariffs filed with the Interstate Commerce Commission.

I wish to offer a copy of our current loading and unload- [fol. 251] ing charge tariff. (Tr. 212.)

(Said document was thereupon received in evidence as Defendants' Exhibit 22 and is certified to this court.)

Except for the period from May, 1917 to March 1, 1920, the loading and unloading charges of the Yards Company have always been paid by the line-haul railroads hauling live stock to and from the yards and the services performed by the Stock Yards Company for this money is entirely separate from any other service performed by it.

In 1930 the Stock Yards Company unloaded for 23 railroads 204,828 cars containing more than 14,000,000 animals and loaded out 48,501 cars. Practically all of these cars were brought to the Stock Yards Company chutes in train lots, some trains having as many as 70 cars. These cars are brought to the unloading platforms of the Stock Yards Company by the engines and crews of the line-haul carriers and the crews remain until the live stock is unloaded and then take the empty cars immediately back to their lines. It is imperative that empties be immediately removed in order to prevent congestion which would greatly delay the entire movement.

The Stock Yards Company has facilities for setting 350 (Tr. 213) cars at one time with two chutes to each car length. The first train arriving is unloaded into the odd numbered chutes and as soon as the empty train is removed another train can be set at the same platform and unloaded into the even numbered chutes and while this latter process is going on, the Stock Yards employees are removing from the odd numbered chutes the animals from the preceding train, which makes the process practically continuous.

The complaint in this case relates to shipments consigned to the Yards and the actual work done in unloading live stock at the yards may be described as follows: On arrival of a train of live stock at the chutes, the employees of the Stock Yards Company immediately start unloading the animals into the chute pens. The train crew

[fol. 252] remains at the platforms while the animals are being unloaded and take the cars back to their own lines as soon as empty. The Stock Yards employees on the platforms, or unloading chutes, must make records of the cars from which they are driven. While this is being done the conductor takes the waybills to the Receiving Office, where clerks prepare bulletins, which are publicly posted, to notify the consignees, who in most cases are the commission firms or other selling organizations. At the same time the original records are started and passed along to the Yardmasters, who continue the records, showing the disposition of the animals. Record must be kept of the dead or crippled animals, both the railroad and (Tr. 214) the shipper looking to the Stock Yards Company as their neutral representative to protect their interests. Other records must be made from which the freights may be collected, one of the services performed by the Stock Yards Company being the collection and guarantee of the railroad freight or other charges of the railroad company. If the consignees are not on hand to receive the animals on arrival, the Stock Yards Company removes them from the unloading chutes to other pens, where they are locked up and held until called for by the consignee. The service of unloading stock thus performed by the Yards Company definitely terminates when the animals are put into the chute pens. No other service is performed by the Yards Company for the unloading charge paid to it by the railroads. Consignees may take delivery of animals at the chute pens if they so desire, but if this is done it must be done almost simultaneously with the unloading of animals into the chute pens. This immediate removal of animals from the chute pens is absolutely necessary in order to preserve an even flow of live stock from the cars into the yards. If the consignees are not present to take delivery of animals consigned to them immediately upon their placement in the chute pens, they are removed from the chute pens to other pens by employees of the Yards Company.

[fol. 253] I heard the testimony here yesterday from which it might be concluded that these chute pens, which are the pens into which the animals are put (Tr. 215) immediately upon being unloaded, are used to some extent as storage pens. As to what extent this is so, it is not so

during the night, and during the run of the live stock, but when the last train comes in, they may remain for some little time in the chute. They might remain there for four or five hours, but that is not usual. These chute pens are not intended for storage pens. And during the run—that is to say while the trains are coming in—it is not possible for animals to be stored in the chute pens for any time whatever. We remove them as quickly as possible.

One feature in the operation of a Stock Yards which adds greatly to the general expense is the fact that live stock does not arrive at the Yards in an even stream. The largest supply reaches the Yards on Sunday nights and Monday mornings, the number of cars during this period (Tr. 216) having reached as high as 3,228 cars. We have also received in one day 122,749 hogs; on another day 71,792 sheep and on still another day 49,128 cattle. The supply on Tuesdays and Wednesdays is usually very much lighter than Monday with Thursdays somewhat better than Tuesday or Wednesday, with very light receipts on Friday and practically no receipts on Saturday. The Stock Yards Company must be prepared to handle the live stock as it arrives, in whatever quantity, efficiently and with dispatch. They must keep a suitable force on duty at all hours during the day and night. Watchmen must be on duty at all hours all over the property. Police must be provided to protect the property and keep order. It is greatly to the advantage of all concerned, the producers, the railroads, the selling agencies, the packers, and the consumers, to have all of these activities centered in one place such as the Union Stock Yards so that the Stock Yards Company by functioning for all of these interests may balance up the work to the best advantage. In the report of the Com- [fol. 254] mission in the Chicago Junction Case, 71 I. C. C. 631, it was said that all parties agreed that this was the only practical method of handling the live stock traffic and this is correct.

The second activity of the Yards Company entirely separate and distinct from its activities in unloading or loading live stock, is that of furnishing a stock yards service to shippers and consignees of live stock. The Yards Company is a stock yards (Tr. 217) under the Packers & Stock Yards Act of 1921 and is posted by the Secretary of Agriculture as such. As such a stock yards it performs the service of furnishing facilities at the yards in connection

with the receiving, buying, selling, marketing, feeding, watering, hauling, delivery, shipment, weighing or handling of live stock in interstate commerce. Its charges for these services are filed by it with the Secretary of Agriculture as required by the Packers and Stock Yards Act. I wish to offer at this time as an exhibit a copy of our current tariff filed with the Secretary of Agriculture, together with four amendments thereto.

(Said document was thereupon received in evidence as Defendant's Exhibit 23, and is certified to this court.)

Ever since the effective date of the Packers and Stock Yards Act, the Secretary of Agriculture has exercised a continuous jurisdiction over the Yards Company. Voluminous hearings were held over a period of years and a number of reports were issued. The case is still pending undisposed of and hearings may be resumed at any time. All of the charges for Stock Yards services, contained in our tariff filed (Tr. 218) with the Secretary of Agriculture, are involved in this proceeding and all of the services performed by the Yards Company are being investigated with the single exception of the unloading service, as I have described it, and the loading service. None of the charges filed with the Secretary may be raised or lowered [fol. 255] except with his permission and approval. Generally speaking, this stock yards service consists of caring for animals, feeding and watering them, driving them when necessary, furnishing proper and sufficient pens in which they may be kept, furnishing weights and scales and performing a variety of other services incidental to the proper care of such animals. It includes in fact all of the services performed by the Yards Company except those heretofore described as constituting the unloading service and the service of loading live stock. Thus, a service additional to the unloading service is performed by the Yards Company, even on live stock of which possession is taken by consignees immediately upon unloading and while the stock is in the chute pens. Such animals must be driven across property of the Yards Company, there being no other way of getting the animals from the chute pens to a location outside of the yards. On all animals of which the consignee does not take possession while they are in the chute pens, a yardage service is also performed. As explained, these

animals must be removed almost immediately to other pens and are there held for sale, and during this time they receive the stockyard services which I have mentioned. (Tr. 219.)

After delivery of the live stock to the commission men or other selling organizations, the animals are, by these selling agencies, prepared for sale in such manner as it is deemed will bring the most satisfactory results. When the animals are sold they are brought to the scales, where they are weighed by the employees of the Stock Yards Company in the presence of the buyer and seller, and a weight ticket, in quadruplicate, is made with what is known as a "self-registering beam," in order that every possibility of error may be eliminated. One copy of the ticket is provided for the buyer; one for the seller, and two retained for record. Fifty scales must be manned, properly maintained and frequently inspected. While this large [fol. 256] force must be ready to weigh promptly any animals brought to the scales, there are many days when the average work done at each scale is very light; still they must be always ready, and this is a serious expense in connection with the weighing. As soon as the animals are weighed, employees of the Stock Yards Company drive them from the scales to suitable holding pens, where they are held awaiting the disposition of the purchaser, and when the purchaser arrives, delivery is made to him by a Stock Yards employee. If the animals are purchased for shipment, the Stock Yards employees drive them to the Shipping Division and again act as Agent of the railroad companies in loading the animals from the chutes into the cars. To perform all this service requires an organization and facilities which are very complete. (Tr. 220.) The organization must be prepared to function at all hours and must always be maintained at a point which will enable it to take care of the maximum amount of business. Handling stock in this fashion, both as to loading and unloading service and the yards service, is the only thing that renders practical the receipt, sale and delivery in the Chicago market of the animals that are handled there daily. The Chicago market is now and for many years has been the largest and most important live stock market in the world. It has reached this development only because live stock deliveries are concentrated and are handled

in the manner which I have outlined. This method of handling has also enabled substantial economies to be put into operation in other directions.

An important function of the Stock Yards Company is in connection with the furnishing of weights on which the railroads base their freight charges and on which the consignees and selling agencies make account sales and returns to the consignors. For almost half a century after the opening of the Yards these weights were secured by [fol. 257] weighing the loaded cars and thereafter returning the empties to the railroad track scales; the weights were then telephoned or telegraphed back to the various railroad offices.

About fifteen years ago the railroads formed a Joint Agency and arrangements were made by which the actual hoof weights are furnished by the sales agencies and on this weight the freight (Tr. 221) is based, the method being as follows: the live stock train conductors deliver their waybills to the Stock Yards Company; from these bills, as heretofore stated, the bulletins are made up and posted, advising the consignees of arrivals. The waybills are then taken from the Stock Yards Company's Receiving Office to the office of the Joint Agency, where the waybill and the stub are numbered so that they may be readily matched up when they are later returned to the Joint Agency. The Joint Agency rate clerks check the rates and the minimum weights; and the number of animals, in accordance with the count furnished by the Stock Yards Company, is placed on the stub and waybill. The stubs are then separated from the waybills and distributed to the various commission firms and sales agencies, who insert the actual hoof weights as ascertained from the Stock Yards Company's scales. The stubs are than returned to the Joint Agency and matched up with the original waybills. Here the extensions are checked and the bills are refigured where the actual weights are in excess of the minimum and the stub is once more checked with the waybill to see that they agree. The waybills are then kept in the Joint Agency and the necessary records made from them, a statement being prepared showing the amount due all the railroads and this statement and the stubs are sent to the Stock Yards Company for collection.

For a long time the railroads did not (Tr. 222) get their weights in this fashion, but got them themselves before

the stock came over to the yards, and then when the car was made empty, they took the car back and weighed it light, [fol. 258] then deducted the one weight from the other, and in that fashion got the weight of the animals. As to whether that was a very cumbersome, slow, and unsatisfactory method of getting the weights, as I understand it the railroad men were handicapped by having to take these cars back to a particular place, or a particular scale, and then there was not only that difficulty, but there was the delay in some of the cars missing the scales, in getting the weights, and at times they had to take the tare on the cars anyhow. So that it was at best an unsatisfactory process not only for the railroads, but also for the consignees. The present method of ascertaining the weights was put in, I assume, as an economy measure, and as a more efficient way of doing what the railroads were able to do on their own scales. As to whether at the present time the old antiquated methods (Tr. 223) of getting the weights could be restored if it became necessary, I imagine this could be done only over the dead bodies of the terminal superintendents. I have an idea that the consignees and the people who depend upon the stockyard weights, and the people who pay the freight charges might also have some objection to it. The present method of securing the weights has been satisfactory to everybody. The present method is actual hoof weights, taken by an independent party, to wit, the Stock Yards Company.

The consignees habitually receiving stock at the Yards furnish a bond to the Stock Yards Company guaranteeing the payment of the freight bills of the railroad company to the Stock Yards Company. This enables the Stock Yards Company to pass all stock immediately along into trade channels. The volume of these freight transactions is indicated (Tr. 224) by the high spot in 1918 when the Stock Yards Company gave to the railroad administration a check for $985,323.27 for stock freights for one week.

In my opinion that is also a substantial advantage to the [fol. 259] consignees who are obligated to pay the freight charges, for the reason, of course, that they do not have to deal with individual railroads. This method of handling the freight charges permits them to deal with one party, being a party located conveniently to their places of business.

The Western Weighing Association representing the railroads has its representatives at the receiving platforms throughout the Yards checking and reporting on the condition of animals on arrival, weights and other details as instructed by the railroads. The Stock Yards Company's fifty scales are inspected regularly by its own experts under the direction of and in accordance with the rules laid down by the Secretary of Agriculture and the scales are independently inspected by the City at regular intervals.

The U. S. Government inspects all the arrivals so that any (Tr. 225) diseased animals in the receipts may be segregated and given further inspection when necessary.

As a result of the methods of handling live stock which have obtained in Chicago for the last fifty years, an essential speed in handling the traffic has been developed. This speed is necessary if congestion and delays are to be avoided. It permits the handling of live stock in trainload lots, which could not possibly be done if deliveries were scattered. It permits the making of necessary records without delay or damage to the stock itself and has proven eminently satisfactory to everybody and must be conceded to be the only practical method of taking care of the volume of live stock traffic which moves to and from Chicago every day. The system of handling has been developed over a long period of years and improvements have been constantly made as experience dictated their desirability or necessity. This entire structure would be torn down by any requirement that live stock deliveries in the congested areas of the Chicago Yards should be made [fol. 260] in any other fashion. It would in effect be a reversion to practices which obtained from 25 to 50 years ago, but which have long since been outgrown.

I have also had prepared from the records of the Yards Company a statement of all shipments arriving at the yards consigned to the Hygrade Company during the year ending with the month of September, 1931, which I desire to offer as an exhibit. This exhibit contains all pertinent information with respect (Tr. 226) to each shipment and is self-explanatory.

Mr. Curran: The information contained in this exhibit appears to be information with respect to particular shipments from particular points to the Hygrade Company at its plant at Chicago. We expect to establish, I think we

have established, that the Chicago Union Stock Yards is a common carrier subject to the Act and if it is so subject, this information is unlawfully given publicity. I object to the exhibit on that ground.

Mr. Towner: I have one obvious answer, Mr. Examiner, and that is that the Stock Yards Company is not a common carrier (Tr. 227).

Mr. Curran: If the exhibit is accepted, then I object to passing out any of these exhibits to strangers, and request that the exhibits be kept in the Commission's file until the question is determined as to whether it is relevant or not (Tr. 228).

Mr. Towner: I will withdraw the exhibit at this time and file a restatement of the material in it within ten days. I will undertake to eliminate from such restatement all of the material that could possibly be objectionable under the Act.

Mr. Curran: I have no objection to that.

Exam. Smith: Exhibit No. 24 is hereby withdrawn, and a substitute constructed as indicated will be furnished (Tr. 229) to the Commission within ten days.

[fol. 261] Mr. Towner: And I might add this, too, that the substituted exhibit will be based entirely on the information contained in the exhibit which Mr. Henkle has identified.

Mr. Curran: And may I point out one thing on the exhibit in the last column I noticed that you showed some of these cars yarded, and others delivered. Now when you prepare your new exhibit, will you explain what you mean by those two terms?

Exam. Smith: Well, I think perhaps Mr. Henkle could explain that right now. (Tr. 230.)

The Witness: By the term "yardage" as shown on that exhibit I mean that employees of the Stock Yards Company have removed the animals from the chute pens in all cases where it said "yarded." In the case of those cars after which appears the word "delivered" it means that the employees of the Hygrade Corporation themselves took delivery of the animals directly from the unloading chutes. That is all it means.

Assuming a delivery of stock inbound to the Hygrade Company at the unloading chute, the length of the drive from such point to the plant of the Hygrade Company is

not over 450 feet. The longest drive would be less than half a mile. That would not apply to animals that were yarded as I have described, but I am speaking of hogs only. Cattle might be further away, but it is not likely that they would be. (Tr. 231) The maximum would be greater and the average would be greater because they might take them from some scale at a remote part of the yards. But the minimum would be about the same. There would be no difference in the case of other animals. (Tr. 232)

I heard the testimony yesterday with respect to the making of claims against the railroads and the payment of them by the railroads. As to whether, after animals have been yarded by the Yards Company, that is to say, after the unloading service has been finished and completed, an injury occurs, the Yards Company ever receives claims for such [fol. 262] injuries: It depends upon conditions. Sometimes we receive them, and sometimes the railroads receive them. As a matter of fact though the Yards Company has received many such claims, and we have paid many of them. And we have successfully defended many of them. It is not correct to say that in every instance the railroad company assumes liability for loss and damage to animals until they are actually out of the Stock Yards. (Tr. 233.) As a general proposition it is true that the liability of the railroad company is confined to the unloading of the animal.

Cross-examination.

The yardage charge is the same on all deliveries at the Union Stock Yards, whether the consignee takes immediate possession or leaves the stock at the yards for a considerable period. In other words, the charge is the same if immediate possession is taken, or if it stays there for two or three or four days, or a week, except that in the latter case it would be necessary to buy feed and perhaps bedding. That is in accordance with our tariff on file with the Secretary of Agriculture. There is no limitation upon the length of time the Hygrade Company is permitted to store the animals. (Tr. 234.) We have not imposed any limitation because it is the practice to clean up all the animals every day as nearly as possible, and nobody wants to keep them there any longer than they can avoid.

The unloading platform is not leased to the Chicago Junction Ry. It is owned by and in the possession of the

Stock Yards Company and that is also true of the unloading chutes. We do not consider the unloading chutes a suitable pen in which to keep animals for a considerable period of time. We consider it a suitable pen into which live stock is to be unloaded.

[fol. 263] Q. You have testified that as a practical matter it is necessary to move the live stock out of the unloading chutes into storage or holding pens in practically every instance except possibly toward the end of the incoming trainloads, at which time it is possible to keep live stock in the unloading chutes.

A. Yes, sir.

Q. Now also without regard to the tariff provisions, and with regard particularly to the management of the live stock at the (Tr. 235) Union Stock Yards, would you not say that it would be necessary to have holding pens in addition to the unloading chutes, in order to handle live stock for purposes of delivery?

A. If by holding pens you mean other pens into which the animals may be placed awaiting the arrival of the consignee, I would say, yes.

[fol. 264] Our pens are not leased to anybody. We retain possession of all pens at all times. As a matter of convenience we allot certain pens to some commission men but they are still under our lock and key and subject to our use at any time. We do that so a customer will know in what alley he may usually find his live stock. (Tr. 236.) We have particular locations in various parts of the yards that are specifically assigned for use by the packers, but they are still under our lock and key and available to us for use by any other patron. We make the assignment to all packers in the same way as we do to commission men. We never made one for the Hygrade Company because it picks its stock up wherever it happens to be. It can have a pen at any part of the yards that is necessary to collect the hogs in. We treat everybody exactly alike. (Tr. 237.) If the Hygrade Company asked for the assignment of pens, I think we would assign them, but I cannot be sure until I have looked into the detail of how they handle their hogs. I have never had any complaint from the Hygrade Company, and so far as I know they are satisfied with their arrangements in the yard. I do not recall any request for a special assignment of pens to the Hygrade Company.

Generally these assignments are made only to commission men. In some cases the Stock Yards Company pays dam-[fol. 265] age for injuries. (Tr. 238.) We would not pay claims arising after the consignee has taken charge of the animals but would if they are kept in particular pens and were injured as a result of negligence on the part of the Stock Yards Company. I would say we would not do that before delivery has been made to the consignee.

Not all of the packers served by the Yards make settlement of the freight charges with the Stock Yards Company. There are some exceptions by superintendents who have made special arrangements with the Railroad Joint Agency or the representatives of the railroads who are paying their freight charges direct.

Redirect-examination.

(Tr. 239.) If there was no necessity for taking animals out of the chute pens immediately after unloading, those pens could be used until delivery had been made. They are the same size. They do not contain water but that is because no water is wanted in the pens by consignees. The quick movement in and out of these pens is due to the fact that they must be vacated to make room for incoming stock. The pen itself is all right as a holding pen. Hogs can be fed but the pen is not intended for that. (Tr. 240.) We could feed hogs in the chute pens as well as the storage pens, as they are fed on the ground anyway. The consignees and shippers do not want water in the chute pens because if the hogs drank then they would not drink again just before they were sold and they would weigh heavier for freight purposes. Consignees do not want water in the [fol. 266] unloading or chute pens, and we only water animals at their direction.

Re-cross examination.

(Tr. 241). What I said about feeding on the ground does not apply to cattle or sheep.

E. L. Kemp was thereupon called as a witness for defendants, and being duly sworn testified as follows:

I am general agent of the railroads at the Union Stock Yards (Tr. 242). I have been in that position since August, 1918. I look after the handling of all freight con-

signed to industries within the stockyards and located on the Chicago Junction Railway and all freight originating at industries on the Chicago Junction, Chicago River & Indiana, Chicago Produce Terminal and the Potato Terminal. My duties include the collection of freight charges. I heard the testimony with respect to certain shipments of live stock that came into Chicago consigned to the Hygrade plant on the Chicago Junction. I think that occurred in September, 1930. In the particular conversation three cars were involved (Tr. 243). The Traffic Manager of the Hygrade Company directed that the cars be delivered to his plant in accordance with the billing. At that [fol. 267] time the cars had been unloaded in the chutes of the Stock Yard Company. He requested that they be delivered to the Hygrade tracks in accordance with the billing. I asked him "How about the charges?" and he said, "What charges?" I said "The charges in addition to the Chicago rate." He said there should not be any charges, and I told him that was where we differed. He said, "The bond should cover that." I told him we wanted an understanding as to what the charges were before we let loose of the stock, and that we wanted his assurance that he would pay the Chicago Junction switching charges of $12 before we would release the stock. He was very positive in saying that he could not see his way clear to do that. He declined to pay the Junction charges, and that ended the matter so far as I was concerned (Tr. 244). It was not necessary to tell him the delivery he requested would be made upon the payment of the charges, because I told him what I wanted him to do before I would order them delivered. Under appropriate tariff provision the prepayment of those switching charges of the Junction is required before delivery, and I also wanted to establish definitely that the charges would be paid without question. I was met with a definite refusal. The Chicago Junction tariff to which I referred is the one that was filed here. On the Chicago Junction they look to the party ordering delivery to pay the charges (Tr. 245). It is necessary for somebody [fol. 268] to provide the funds for the switching service. The Hygrade Company did not supply the charges.

WILLIAM J. O'BRIEN was thereupon called as a witness for defendants, and being duly sworn testified as follows:

I am General Manager of the Chicago Junction Railway Company and have been for about 14 years (Tr. 246). I have been connected with the railroad for 44 years, all of that time within the stockyards district. I am familiar with the conditions out there and with the plants.

I understand the complainant wants his live stock delivered in cars to his plant. I am quite sure my railroad had nothing to do with the stock consigned to the Hygrade plant, as Mr. Kemp stated the animals were unloaded at the Stock Yards Company when the question arose. I understand the rule and practice is that our charges have to be prepaid (Tr. 247). I think it is authorized in the Galligan Tariff. I understand the same rule applies generally on all switching lines in the Chicago district. I am familiar with the layout at the Hygrade plant. I think I saw it the last time within the last two or three months. An objection to delivering live stock to the Hygrade Company at its plant is that it has no unloading facilities. The track [fol. 269] was not constructed with the idea of providing live stock facilities but might be rearranged or made suitable for the purpose by spending money. Even if unloading facilities were furnished, such deliveries would still be objectionable (Tr. 248). It would be awkward, fruitful of delay, and more than usual expensive.

To explain how live stock is handled today into the Stock Yards, and how it would have to be handled if cars were delivered at the Hygrade plant: Today, the trains are hauled by the engines of the trunk lines direct to the unloading platforms of the Stock Yards Company; the crews and engines remain with the trains, and after the cars are unloaded they are moved home to their own terminals, which is a very expeditious method of handling the heavy run of live stock. That method has been in existence ever since the Stock Yards were constructed, in 1865 or 1866—about 66 years. If this other method were employed it would mean special arrangements which I will have to visualize, it never actually having occurred. It would mean the separation, the switching out of these particular cars of stock, I assume in the home terminals of the trunk lines, that is, I mean the line bringing the stock to Chicago. We could not permit that to occur on our tracks, in our yards,

or terminals, because of the congestion and delay that would result (Tr. 249).

As to whether it would be possible for these trunk line trains to stop at some Chicago Junction yard before they got to the Stock Yards, and set out the cars for the Hygrade Products Company, it would be my judgment that that should not be permitted because as I said, of the congestion and delay that would follow from that. Ordinarily these trains move direct to the unloading platforms, and almost every day or every night you will find one train following another, where there are anywhere from 1,000 to 2,000 cars of stock moving; and to stop these trains to do any switch- [fol. 270] ing would be very detrimental; it would tie up the main thoroughfare used by those trains, and diverting them into any special yards for that purpose would be impossible because we have no yard that could be devoted to that purpose. When such a train stops on our main track it necessarily delays everything behind it. On the nights when the stock runs are heavy, we have a very heavy movement of traffic over our rails. I do not know of any district within the Chicago switching district that is as congested as the Stock Yards District (Tr. 250). I do not know of any place in Chicago where we find so many so-called foreign line crews moving over the tracks, of any other company. During this time it is rather light, but when business is normal we often have as high as two hundred foreign engines on our rails, in the course of a 24 hour period. As to whether, outside of the trains themselves, the territory over there is very congested: it is closely built up, and a highly developed industrial territory. We do move our traffic promptly but because of the intense industrial development there are a great many so-called cross movements from one district to another, and necessarily so; but the principal movement of traffic must be maintained at a high order, to avoid congestion and delay. We have that provided today in the present manner of conducting our business. That is the result of this present method of handling live stock, as developed over a period of 66 years.

Q. Now, Mr. O'Brien, supposing the Trunk Line bringing the live stock into Chicago could deliver it—or rather set it out at their own yards—take the Milwaukee Railroad for example; I assume they would set it out, the Hygrade

cars at Bensonville. Then how would they be handled over to the plant of the Hygrade?

A. They would undoubtedly have to send a special engine and crew to complete that delivery, and that would be very [fol. 271] costly, and (Tr. 251) cause them the same interference, the same delay, and interruption to the ordinary routine of their business as would occur if we permitted it on our tracks.

Q. Well, would the engine and crew of the Trunk Line complete the delivery; would it deliver the cars, set the cars out in the Chicago Junction yards and then your engine take them and complete the delivery?

A. Yes sir—I mean, complete the delivery to us. We would be obliged to complete the delivery to the industry, as we do not allow foreign crews to do work at any of our industries.

It is a fact that so far as deliveries to the Union Stock Yards are concerned, all of the Trunk Lines have a right of way over our tracks to make those deliveries only, that is, to the Union Stock Yards & Transit Company's platforms, with live stock trains. (Tr. 252)

By Exam. Smith:

Q. Now then, suppose I were shipping in some sort of machinery, say, to a plant on your railroad. Have any of the line haul carriers a right to go over your rails?

A. They bring the cars to us at interchange points.

Q. To your interchange point?

A. Yes—receiving yard; and we complete the delivery to the industry.

Q. Take the matter that is before the Commission now; assume that we use the Milwaukee—and the Milwaukee is the line haul carrier on some cattle consigned to the Hygrade Food Products Company, and the Milwaukee switches them out, we will assume, at their distributing yard, could they haul those cars, after they have separated them, over the Chicago Junction and deliver them to the Hygrade Company? (Tr. 253)

A. No, sir, They would have to interchange with us at our interchange yard, and we would do the hauling and placing at the Hygrade plant.

[fol. 272] By Mr. Connell:

Q. Why did you say they would have to practically make a special movement with that car, or with those cars, from their switching yard to your interchange point?

A. Well live stock is usually handled without delay, and in many cases under the requirements of the Confinement law the animals must be unloaded within a certain specified time, requiring that the delivery be expedited. And that is the reason it is hurried to the Union Stock Yards.

Supposing these cars were handled over from the Bensonville yard of the Milwaukee Railroad, by the Milwaukee to our yard, then we would have to find out whether the crew had (Tr. 254) sufficient time under the Twenty-Eight Hour Law or the Thirty-Six Hour Law, whatever it might be, to place it at the Hygrade plant—before we receive it, we would have to know that we had time sufficient in which to handle it, without violating the law. We would ordinarily have to have an engine down at that interchange point, to get the stock and hurry it over to the Hygrade. I think without doubt the same special handling would have to be carried on until the delivery was completed.

Q. Now as I understand your testimony Mr. O'Brien it would not be impossible to place these cars at the Hygrade plant, providing they were equipped with proper loading facilities, but it would be impractical.

A. Very much impractical.

Q. Well, now what would happen if a number of other packers located in the same district demanded that their direct shipments be placed at their plants. (Tr. 255). Would that be impossible?

A. I view with a great deal of alarm any thought of that kind, because I know from the experience that I have had the difficulties already encountered in handling these heavy runs of live stock, and necessarily I can only visualize or [fol. 273] try to imagine what the conditions would be that we would have to deal with on this new proposed basis; and having regard for the fact that all of the territory has been built up on the old basis of handling, I can conceive of very great difficulties and changes in facilities involving possibly the tearing down of immense buildings, and the construction of new facilities adequate to take care of the peak requirements, that make of this something that—well,

it impels me to say that it is almost impossible, except at an enormous expenditure of money that would not be at all justified in my opinion. (Tr. 256).

There are about 25 other packing plants immediately around the stock yards, in practically the same position as the Hygrade plant, and while some of them are small, some of them are the largest in the world. (Tr. 257). As to what would happen if all or a large number of those packing plants should demand the same direct delivery service as the Hygrade is demanding here: In the first place, this live stock for direct delivery would have to be segregated and brought to us at some receiving yard which does not now exist, and which I would not know where to build, if I had to, tomorrow. We haven't any place for it. And we would probably have to tear down some buildings to make room for it.

After that live stock is received, its delivery to these various packing plants, large and small, would require a character of engine service such as I can only compare with the handling of high class perishable freight—the most difficult, the most exacting, the most expensive; and even with all of those provisos, it cannot be successfully handled without the entire cooperation of the receiver. In other words, no matter what we might do in the way of furnishing additional engines and crews at the certain (Tr. 258) and various hours when we might be called upon, un- [fol. 274] less the receiver's facilities were adequate, and there would be that same cooperation in the way of unloading forces adequate at the time required, and those facilities were of a character that would enable them and us combined to unload the live stock promptly, properly and efficiently, we would all fail in approximating the present day prompt and efficient service.

As to whether it would require an almost complete reconstruction of our facilities out there in that district, it would to a very large extent, and more than that, in my opinion, in my view of the matter, it would be the facilities at the plants that would be not only difficult, but expensive, and which in order to be adequate would have to be most elaborate as compared with the present-day handling. The unloading of the live stock ought to be near the place where the slaughtering is done. That today is practically all occupied with immense buildings of various kinds and

types, and reconstruction on that basis would indeed be a problem, taking no account of the track facilities, the unloading platform, the yards and pens for the cattle, hogs and sheep, and the proper spotting of the different kinds of animals at the different places to be unloaded, would require a service for the various firms from all of the twenty odd railroads that we would receive them from, such as to make (Tr. 259) this a task beyond anything that I have ever had to deal with, and I have very little conception of what it might involve us in, to say nothing of other incidental features of caring for the dead animals, and the weights, and the checking, the out-turn, and all of that which goes with the collection of freight charges, and other incidentals.

There are other packers out in the stock yards' district that receive direct shipments of live stock, besides the Hygrade. I rather imagine all do. We do not handle the detail of that, but it is a matter of common knowledge. Ar- [fol. 275] mour & Company will receive 30,000 hogs direct on a Monday, and I imagine all of them to some extent more or less indulge in that same practice. Those deliveries are all made through the Yards. (Tr. 260.)

As I have testified, where there is a big run of live stock, the train crews and individual motive power units of the line-haul carriers follow each other into the Yards to deliver at the unloading platform. When everything is running smoothly, you will find lots of trains of cattle unloaded one minute to the car. They have several crews unloading at the same time. There are 10 platforms, and we frequently have very long trains. I have seen as high as 85 and 86 cars in a train. They do not unload one car at a time, but they are unloading several cars in the same train at the same time. So that they may unload 20 cars in that same minute. One minute is the average time per car under what I would call favorable circumstances. In the winter time, or on rainy nights, there is difficulty in unloading double-deck cars of sheep, also double-deck cars of hogs. (Tr. 261.) There are many trains that are unloaded in sixty minutes, of sixty cars, but I would say that the average is a little more than that. It is probably nearer a minute and a half, and in bad weather, two minutes to the car.

By Exam. Smith:

Q. If I get your testimony correctly, the Milwaukee road, let us say would have a train in there of 40, 50, or 60 cars. The North Western would be following right straight along behind on the same track, ready as soon as the Milwaukee train moved out empty to move up to these same platforms and chutes.

A. Yes, sir, that is correct. (Tr. 262.)

Q. Now, then, the substitute arrangement that you are trying to visualize here would substitute in place of these long trains, one following another over your road, shorter trains—although some trains for the larger concerns would [fol. 276] be fully as long as some of these other trains—but shorter trains, going to a half a dozen different localities, and all moving over your road but not following one after the other.

A. Well, we would have to have a common receiving yard now, and that would be—the ideal arrangement, if we were to handle this stock would be to have a common receiving yard for it, coming from all of the railroads; but as I said before, I do not know just where that yard could be or would be.

Q. Well, if I get your idea correctly, you would have to supply a part at least of the number of engines that the line haul carriers now use for moving these cars over there. You have no such wealth of equipment as to take care of these separate stock trains, have you?

A. No, sir, we would have to have the motive power to move the stock in cars from the interchange point where we would designate for receiving them, to the industry unloading them—to their unloading facilities.

Q. In other words, the line haul carriers now provide that motive power to go up to the Union Stock Yards & Transit Company's docks. (Tr. 263.)

A. Yes, sir.

Q. And you would have to supply that in their place largely—it would not put the Union Stock Yards out of business altogether, but to the extent that it did put them out of business, you would have to supply that motive power, would you not?

A. Yes, sir. I think I might add there that it is more likely that any such plan would involve cars of live stock

to be switched out and handled specially to the different industries from almost every train, because live stock is bought everywhere in the west, and it is fair to assume that [fol. 277] that would be our problem, to have shipments of stock in almost every train more or less that would have to be handled specially, as I have outlined. It is very expensive, very difficult to handle these small lots in special movement, and would undoubtedly affect our other and ordinary perishable freight business. It would without a doubt require considerable idle time for the engine waiting for those cars. As a rule they now handle full trains in these transfers, between different railroads, of 40, 50, 60 and 70 cars, (Tr. 264) although once in a while you can see an odd car that must be handled the same as if it was in a train. That is a special move, and that is what is expensive, I say.

Q. Now, Mr. O'Brien, getting back to direct deliveries to the Hygrade plant, supposing this arrangement was put into effect. We will assume, of course, that they receive stock by several different railroads the same day. Now, supposing these cars were spotted at the various yards by the trunk line. Will you explain in some detail just what you would have to do before you could make delivery to the Hygrade.

A. Well, I assume the trunk line would bring the cars of stock for the Hygrade to our designated receiving yard, or interchange point. We would require advance notice of that; we would want to know how much time we would have to complete our delivery, and not violate the law. We would have to have (Tr. 265) a reasonable time. Supposing we did not have time enough to make our delivery without violating the law, we would decline to receive it; and the trunk line would have to dispose of it in some manner or other, so that they would not be violating the law. We would try not to assume any obligation under the law when we knew the time was about to expire, before we would have time to deliver the stock. As to just about how much time I think we would have to have from the time we received the car at our interchange with the trunk line until delivery was made. [fol. 278] Having in mind that this might reach proportions of some volume, and at all hours, from all directions, for all of the industries involved, my impression now is that we would have to have at least five or six hours' time in which to

perform our service—again depending on the adequacy of the consignee's facilities, their character, location, means (Tr. 266) of access—all of that goes with it—including the labor furnished to do the actual unloading. We would undertake to move the car as promptly as possible after receipt and inspection, checking the billing, taking the proper seal records, and moving it. (Tr. 267.) It would have to be by special engine, and through various districts into the destination, where this industry is located, and there, by removing such cars as might interfere, we would place the car at the unloading platform and chute designated for that particular kind of stock, and complete our delivery, and then remove the empty car as soon thereafter as possible, and return it to the delivering line—which I assume would be anxious to get it back as soon as it could, in order to complete their own weighing process for weight purposes.

Supposing there were several cars, we would have to keep our engine there and spot all the cars, and to make such switches as were necessary, and be a good deal like the fire department, ready to respond to a call at any moment. If there were more cars than the track would hold at one time, that would mean additional switching, and cutting, and spotting, and would involve a good deal of extra work, because at most of these plants the track facilities, not having been provided for this kind of handling, would not permit of what I would call an efficient handling of that character of business, and would require additional switching, because of the inadequacy of not only their facilities, but our own. This would all contribute to further delay and congestion. (Tr. 268.)

[fol. 279] Government inspection would be required, and where the Government forces now cover a multitude of cars, or trains, by one man, or two men, here their inspectors would have to be scattered all over, all of these plants, and cover I imagine a 24-hour period every day in the week and month, and naturally the Government forces would have to be enlarged.

As to the weighing, we would not undertake to do any weighing on our tracks; we never did, and it would be such a problem of movement to and from scales, congesting our running tracks to a point where we would not undertake to do that for anybody. Our charge on live stock does not de-

pend on the weight. I think our tariff is set up on the basis of 2 cents per hundred pounds, 60,000 minimum, but we do not have any trouble collecting live stock freight charges on that basis, without weighing.

Supposing traffic was handled directly to the industries in the manner I have described, that would result in a much greater delay to the empty cars than by the present method, (Tr. 269) because the empty cars after the stock is unloaded, would have to be switched back to an interchange track at a point where we would make delivery to the connecting lines on all outbound business from our district. In that way those cars would move outbound in regular pulls made by connecting lines, which are ordinarily two or three every 24-hour period. As to whether we would make a special move in that case with the stock cars, we might be compelled to make it up to the interchange point, to free the locality where the stock is unloaded; but the interchanging line, taking the cars home, would take them in their regular pulls, in their own trains, at their convenience, or in accordance with their own needs.

This interchange yard I have been talking about is the one I said a while ago would have to be built if we were going to make this new arrangement. It certainly would be, [fol. 280] if there is any basis for assuming that it is going to grow in volume, as I honestly believe, if it is of any advantage to the Hygrade Company, it will be of advantage to every one of their competitors. They will all have to have the same service. I am very well acquainted with all of the packers (Tr. 270) out in that district. It has been my experience that they all wanted whatever one of them got. They insist on getting it—especially if it is of any benefit or advantage to them. They watch each other pretty carefully; and we aim to give them all good service all the time.

[fol. 281] Cross-examination.

(Tr. 271.) If we received cars requiring delivery at the plant of the Hygrade Company, we would insist upon the collection of our tariff switching charges from the trunk line that gave us the cars. The cars would be delivered by the trunk line at our present interchange track at 40th Street and Ashland Avenue. (Tr. 272.) That is right in

[fol. 282] the center of Exhibit 1. We have no other interchange tracks for the receipt of business. It certainly would make a difference in making the delivery if the Hygrade plant had been constructed with suitable unloading platforms. (Tr. 273.) We must know before we accept a carload of live stock that we can deliver it and put it at the place where it can be unloaded. We do not require prepayment of charges from a railroad that agrees to pay our charges on the cars which they deliver to us. My assumption as to the necessity of building an additional interch-nge yard was based upon the feeling that we might have from 200 to more than 1000 cars in one day. (Tr. 274.) If we had 200 additional cars it would be necessary to construct additional interchange tracks. At the present moment the junction is suffering from the depression like everybody else. There is still a large area served by the junction which is being promoted actively. We would not resist that promotion at all if it results in increasing our business. We would welcome it. We would be glad to see more live stock come in. The question is the method of getting it in. I do not know whether we would be paid $12 per car on live stock or not. Nobody yet has been willing to pay. (Tr. 275.) I make no distinction between dead freight and live stock in desiring an increase in business and revenue. In the case of cars moved to the express chutes where the horse market is, our requirement is that we have an hour and a half or two hours before the expiration of the 28-hour or 36-hour limit. If we had time to un-
[fol. 283] load them it would be immaterial whether the mit was two hours or six hours. (Tr. 276.) We would certainly start out with the rule we thought was sufficient to require unloading in compliance with the 28-hour law but we have none now as we are not handling that business. Packing plants on the Chicago Junction now having side tracks are Armour & Company, Swift & Company, Wilson & Company, Morris & Company, Anglo-American Provision Company, Hammond Company, Roberts & Oake, Miller & Hart, Guggenheim Brothers, Brennan Company—Brennan Packing Company, Independent Packing Company, William Davies Company, Columbia Company, North American Provision Company, Agar Packing Company and Hateley Brothers Company. All these industries, and the Hygrade Company, are on our rails and have private sid-

ings. (Tr. 277.) I do not think any of them have suitable tracks for the unloading of live stock or land available for that purpose, and that includes the Hygrade Company. I know of the sidings at the plant of the Hygrade Company and that it has some vacant land west of the plant where there were two tracks built when the sewer was built. I understand those two tracks are there and are rented to the Mather Stock Car Company. The entrance to those two tracks is from the east; whereas, all of our traffic approaches the Hygrade plant from the west. Our trail track room is quite small, only five or six car lengths, which would be a most awkward and poor switching arrangement. (Tr. 278.) No one would undertake to lay out that arrangement for the prompt, efficient and proper handling of [fol. 284] live stock. When we move over a switch we must have a certain amount of lead track on which to pull back before moving ahead. That is called tail room. I think we could perform the service in that awkward, expensive and slow way if we stayed at it long enough. We do not undertake to build tracks that way now. I cannot recall any situation where we have a similar tail room situation. If we had some, I presume we could operate it if we stayed at it long enough. (Tr. 279.) We could get the cars in and out, one at a time, if necessary, but that would not be a practical way of performing the work. By Government inspection, I meant the inspectors for the Bureau of Animal Industry who examine animals coming out of the cars for disease. I know there is an examination of the kind made, but I do not know now whether it is made when the animals come out of the car or just prior to the killing. The deliveries are probably made both to the commission men and the packers. (Tr. 280.) In speaking of moving out empty cars, I meant that I would have to assemble them as best I could, all of the Milwaukee cars for the Milwaukee, the North Western cars for the North Western and the Rock Island cars for the Rock Island. That is our general practice and we would have to make those deliveries for the return movement of empty cars on a designated interchange track. Our present interchange facilities would be inade- [fol. 285] quate to provide for the 600, 800 or 1,000 cars or more of this character (Tr. 281) which would move and be the same for all purposes as carloads of freight from one of our industries. We would have to move these cars,

whether loaded or empty, to or from the plant when offered. For a number of year- we have had plans to expand our facilities for interchange on outbound service but not on inbound. From the time we made the plans business has been falling off so fast that it is not pressing now. (Tr. 282.) At the present time the inbound live stock is hauled by the line haul carriers. We have nothing to do with the distribution of empty cars. The same engine that brings the cars in takes them out, and we neither receive nor handle them. The cars are on our facilities only while they are at the chutes and enroute to and from the chutes.

Re-direct examination.

(Tr. 283.) The only inbound live stock the Chicago Junction now handles with its own engines consists of horses for the express chutes. On a sale day that might be 10 to 20 cars of horses. Ordinarily it won't average more than one or two cars a day and on many days not that. The fact that we only require two hours on these shipments does not mean that we could get along with two hours on live [fol. 286] stock to the Hygrade plant. The horses are delivered at a point close to the express chutes and we minimize the amount of time we would require.. The chief delay is crossing over our main thoroughfares. (Tr. 284.) The horses are sometimes handled in passenger train service and sometimes on the head end of stock trains. If we handled live stock from interchange points to the various industries and the empty cars back, we would have to provide yards to store the emptry cars until the trunk line engines came to get them.

Recross examination.

Some of the horses come in on the head end of stock trains from the west. We spot them. (Tr. 285.)

[fol. 287] O. T. Henkle, witness for defendants, having been previously sworn, was recalled and testified as follows:

Direct examination.

I have before me the figures showing the animals handled through the stockyards consigned direct to the packing houses for the first six months of 1931. Eight or ten other

companies besides the Hygrade Company receive such shipments. Those shipments are delivered by the line haul carriers to our platforms, received by us in the regular course of business, and handled the same as all other receipts. (Tr. 286.) The direct shipments to other people through the stockyards are handled in the same fashion as shipments to the Hygrade Company. A large percentage of hogs are purchased in the country and come in that way. A number of the companies receive many more than the Hygrade Company. One receives about nine times as many and another ten times as many. Another receives about four times as many and some receive less than the Hygrade Company. The animals I refer to are those identified as direct shipments, which are purchased on the outside and consigned to these companies at the stockyards. (Tr. 287.) All of such shipments are unloaded at the yards and go through the yards.

Cross-examination.

For the first six months of 1931, 1,425,892 hogs were received consigned direct to the packing houses. (Tr. 288.) [fol. 288] The total number of hogs received at the yards during the same period was 4,028,544. The number of cattle and of sheep would be considerably less. For the first six months of 1931, 21,023 cattle were received direct; that is, they were consigned direct to the packers (Tr. 289) and moved through our facilities. The total number of cattle received in the same period was 1,064,114. The total receipts of sheep for the same period were 1,087,381 and 705,039 were received direct.

Redirect examination.

All of those direct shipments were consigned to packers immediately adjacent to the stockyards and located on the rails of the Chicago Junction Railway. (Tr. 290.)

S. H. Gillette was thereupon called as a witness for defendants, and being duly sworn, testified as follows:

I am Assistant General Freight Agent of the Chicago & North Western Railway Company, and have been with that

company for about 38 years. I am familiar with rate and traffic matters and have under my immediate supervision the terminal arrangements and charges in the Chicago district. It has been our position that the Chicago rate on live stock does not apply to the Hygrade plant. The rate on live stock for a delivery direct to that plant would be [fol. 289] the flat Chicago rate plus the local rate of the Chicago Junction Railway of 2 cents per hundred pounds (Tr. 291), minimum 60,000 pounds, or $12. In August or September, 1930, I had a conversation with the former Traffic Manager of the complainant with respect to direct deliveries to the Hygrade plant and the rate basis to be applied. Our Operating Department called my office and said there were several cars of hogs coming from Sioux City which were to be delivered to the Chicago Junction for placement at the Hygrade plant, and wanted to know what to do with them. I told them that if the billing so read, the cars should be tendered to the Chicago Junction at the regular interchange point, and that I would take it up with the agent at the Union Stockyards and instruct him as to the proper rate. I called the Traffic Manager of the Hygrade Company and told him what information I received, and asked him if he understood that he would be required to pay the legal rate (Tr. 292) which was the flat Chicago rate plus the Chicago Junction charge of 2 cents, minimum 60,000 pounds. He said he would not pay any terminal switching, but would pay the legal rate, and I said that was the legal rate, meaning the combination rate I have just stated. I said that the combination was the legal rate under the tariff, and that later on we could adjust any controversy and determine the proper interpretation of [fol. 290] the tariff. He said he would not pay the Chicago Junction local rate because he was convinced the proper rate was the Chicago rate plus $2.70. I called Mr. Kemp, the agent at the stockyards, and told him of my conversation and that we would tender these cars to the Chicago Junction at Ashland Avenue but would not absorb the Chicago Junction local rate, and that he would have to look to the consignees for the charge. (Tr. 293.) In other words, I told him we would not surrender with the car a prepaid due bill covering the amount of those charges to be absorbed by us, but that if he could reach an understanding with the Hygrade people that they would pay the proper

rate, which was the combination, we would deliver the car with the prepaid due bill, which is the general practice in connection with absorptions we make. Mr. Kemp notified the General Manager subsequently that the Hygrade people would not pay the charge, saying that the Traffic Manager of the Hygrade Company advised that he expected the Chicago lines to make delivery of live stock to his plant on the Chicago rate basis. We tendered cars to the Chicago Junction about the fore part of September, 1930, but we did not send with those cars any billing indicating that we would be responsible for the charges. (Tr. 294.) We instructed the Operating Department to tender the cars to the Chicago Junction at the Ashland Avenue yard, and I suggested that they put a train master on the train and put the cars on the head end next to the engine, which the General Manager authorized, and which was done. When [fol. 291] they got to Ashland Avenue they notified the yard master of the Chicago Junction that they had the cars for the Hygrade Company but the Chicago Junction would not let the cars be delivered there. No particular reason was given for the refusal, but no money was offered at that time or any evidence that the North Western would pay the charges. The Chicago Junction was informed that we would not absorb its switching charges, and the billing accompanying the cars indicated that we would not. (Tr. 295.) The cars were then taken to the Stock Yards Company yards and unloaded. I told the Operating Department that if we did not have time to make any other disposition of the cars we had better take them right into the yards and not leave them on the Ashland Avenue tracks if the Chicago Junction refused to take them. I am familiar with the Galligan tariff. The general practice and the requirement of the tariff is that shipments are to be prepaid before they are delivered to a connecting line for delivery. That applies to any switch line. (Tr. 296.)

J. A. Behrle was thereupon called as a witness for defendants, and being duly sworn testified as follows:

I am Assistant Freight Traffic Manager of The Alton Railroad, and have been in the Traffic Department of that Company for 28 years.

[fol. 292] I am familiar with the complaint in this case and am one of a committee named to defend it. I have examined the applicable tariffs to determine the proper application of rates on live stock to Chicago. (Tr. 297.) The tariffs naming the rates on live stock to Chicago make reference to the Lowry tariffs. That tariff was published by the agent of the Chicago Switching Committee in 1911 and is now published by C. W. Galligan as agent of the Switching Commitee and bears his tariff No. 20-S, I. C. C. 182. It is a terminal tariff outlining the arrangements under which live stock to Chicago is handled, but applies to other freight as well. It is what is generally termed an application sheet, in that it specifies the application of the Chicago rates together with such exceptions as may be designated. The Lowry tariff is confined to a so-called industrial directory published by Galligan as agent under his number 22-V, I. C. C. No. 147. In that tariff the plant of the Hygrade Company on the Chicago Junction is shown as an industry. In Tariff No. 20-S, I. C. C. No. 182 (Tr. 298), which is Galligan's Tariff, there is shown, on pages 39 and 40, the application of rates to facilities on the Chicago Junction. This application of rates is on behalf of all railroads having trunk lines to Chicago, which includes all of the defendants in this case that reach Chicago. There is a continuation of this application to page 40 of the tariff and on this page there appears Index No. 419, in which the plant of the Hygrade Company, as outlined in the Directory No. 22-V, is placed. In the rate basis on the right [fol. 293] of this page is shown the number 6, which means that shipments for delivery on the Chicago Junction Railway, including those to the Hygrade Company, are governed by Rate Basis No. 6. Rate Basis No. 6 appears on page 76, which is headed "Basis for Rates to and from facilities located on the Chicago Junction Railway" (Tr. 299). There is first a classification of freight traffic, except live stock and the heading "Carloads" and "Less Carloads." Secondly, there is an application of rates on live stock shipments to industries, chutes or sidings of the Union Stock Yard and Transit Company in the Union Stock Yards. Under this application there is the provision that the Chicago rate, designated by Rate Basis No. 5, plus $2.70 a car, will apply to the chutes or sidings of the Union Stock Yards & Transit Company at the Union

Stock Yards, and that the railroads will pay on ordinary live stock a loading charge of $1.00 or an unloading charge of $1.00 per car. This is a very clear application and distinctly shows that the charge to the Union Stock Yards and Transit Co. chutes is the Chicago rate, plus $2.70 in the instance of the Western Lines and $1.35 in the case of the Eastern Lines. Otherwise, there is no difference. To the balance of the facilities of the Chicago Junction there is an exception against the application of the Chi-
[fol. 294] cago rate on live stock, so that there is no through rate provided to industries on the Chicago Junction other than the chutes and sidings of the Union Stock Yard & Transit Company at the Union Stock Yards. (Tr. 300.) Those chutes of the Stock Yards Company constitute the only points at which the Chicago rate on live stock, plus the charges of $1.35 or $2.70, applies. The first paragraph on page 76 of the tariff, in connection with the loading and unloading charge, reads as follows:

"Carriers named in first column will pay the Union Stock Yard and Transit Company the charges shown below for unloading live stock consigned for delivery at the Union Stock Yards, Chicago, Illinois, into suitable pens at said stockyards and for loading outbound shipments of live stock from said pens at the stockyards, Chicago, Illinois, namely: loading charge, $1.00 per car, unloading charge, $1.00 per car."

The second paragraph reads as follows:

"The term 'suitable pens' means the pen into or from which the live stock is loaded, unloaded or reloaded directly from or to the car." (Tr. 301.)

There is an additional provision that in the exception to the application of rates, beginning with page 16 of the tariff, a restriction is carried, at the instance of the Trunk Lines, that on live stock to points outside the Chicago District combination rates will apply. There is an exception in the instance of stock to the Omaha Packing Company, and Paragraph 2, Section A, also provides that where the combination rates apply the inbound Trunk Line will
[fol. 295] assume the intermediate switching charge to the delivering line. There is no provision for the assumption

of the terminal charge by the line haul carriers. The effect of my testimony is that the Chicago rate on live stock, plus the charges of $1.35 and $2.70, applies only to the unloading chutes of the Stock Yards Company and the Omaha Packing Company. On other freight coming into the Chicago Switching District and delivered in terminal switching, the Chicago rate applies, generally speaking. (Tr. 302.) It applies to the available facilities of the various lines in the District. There are some exceptions but I am speaking in general terms when I say that. There is a special provision on coal and coke, those rates being carried in other tariffs. In other cases, such as on ice and other low rated traffic, there are exceptions in Tariff No. 20-S, I. C. C. No. 182 restricting the application of the Chicago rates. Eliminating live stock from consideration, there is no uniform application of the Chicago rate to all deliveries in the District. The application of the Chicago rate on all live stock was restricted to the chutes of the Stock Yard Company because the nature of the commodity calls for special treatment. Live stock receives a transportation service given no other freight. We must handle it on scheduled trains and give it expeditious service and follow it through to destination. That situation does not pertain to any other traffic (Tr. 303), which can be handled in a [fol. 296] different manner. In the case of perishable traffic, provision can be made for icing to carry shipments through to their destination, and if there is a shortage of ice, we can adjust ourselves to the situation, but in the case of live stock it is necessary for us to exercise every precaution to furnish the unloading, feeding and watering services which the Federal law requires and which requires additional facilities for live stock. Those facilities are not comparable to those required for the transportation of any other commodities. I know of no other commodity in connection with which there is a criminal penalty if it is kept in the car beyond a designated period, and of no other commodity which is more susceptible to loss and damage as a result of delay in transit. (Tr. 304.) I have heard the operating testimony of Mr. Greer and Mr. O'Brien. The present methods of operation in the Chicago District, in connection with the delivery of live stock, are calculated to best overcome the operating difficulties to which they refer. If those

methods were abandoned and deliveries were scattered all over the District, the Alton, for example, would have to construct facilities to provide for feeding, watering and unloading, which would greatly increase our operating expense. (Tr. 305.) Our live stock rates at the present [fol. 297] time are very low and are not sufficiently high, in my judgment, to warrant the Chicago lines in absorbing the terminal switching charges on live stock in addition to the charges they would be put to if these deliveries are made in any other way than they are now made. At the present time the earnings are very thin, and if we were put to the additional expense as a result of the abandonment of the present method of handling live stock and the installation of split deliveries to whomever might want stock delivered direct, I see no other way than to arrange for entire readjustment of our live stock rate structure. The earnings today are slender, and if we had this additional expense, we would have to look elsewhere for revenue. That is the basic reason for the restriction of the live stock rates to Chicago as they are now restricted. (Tr. 306.)

Cross-examination.

I spoke of the operation of feeding and watering as an additional expense in handling live stock. The service involved is that of stopping the trains and rehandling of such cars as are in need of the service. That service is now given live stock. There would be a change in that if we had to make direct delivery to the Hygrade Company. (Tr. 307.) As Mr. O'Brien explained, the handling of the tremendous volume of live stock to the Union Stockyards [fol. 298] district necessitates prompt delivery of the shipments. The congestion that would be brought about by the disruption of the present operating conditions in the district would back up on the inbound Trunk Line carriers and it would be necessary to arrange for feeding, watering and unloading the stock. All that works back into the train operation. That situation does not apply in the case of deliveries to the Omaha Packing Company because we handle very little stock to that company. My testimony is based on the assumption that we would have to make prompt delivery of all live stock on those consignments. (Tr. 308.) The Western Trunk Line tariff governing feed-

ing and watering in transit is Tariff No. 214-A, Boyd's No. A-2217.

Mr. Towner: That is all for the defendants.

Mr. Rynder: The interveners desire to offer a little testimony.

W. C. Watson was thereupon called as a witness for interveners, and being duly sworn testified as follows:

I am Assistant to the Freight Traffic Manager of Swift & Company and its subsidiaries (Tr. 309). I have been in the Transportation Department of Swift & Company for 28 years and have specialized in rates, rules and regulations pertaining to stockyards and transportation of live [fol. 299] stock. The Omaha Packing Company is a subsidiary of Swift & Company and all transportation matters for it are handled by Swift & Company. I look after matters pertaining to its live stock. The Omaha Packing Company is a Kentucky corporation and operates a packing plant at Chicago, slaughtering hogs principally (Tr. 310). Its plant is located at 2320 South Halsted Street, a little more than two miles north of the Union Stock Yards on the tracks of the Chicago, Burlington & Quincy Railroad. It is not on the line of the Chicago Junction but is an industry of the Chicago, Burlington & Quincy. I have investigated the complaint in this case. For a good many years all live stock slaughtered by the Omaha Company has been shipped direct from country points, the location of which depends upon the market supply and other items which enter into the purchasing of live stock. It buys no live stock at the stockyards (Tr. 311). If it did, it would have to reload the live stock and switch it to the Omaha plant at a charge of 2½ cents a hundred, or about $15 a car, or drive the live stock about 2½ miles north on Halsted Street to the Omaha plant. It would cause delay to load the live stock into cars for the movement and it would probably be an over night move. Halsted Street, between the plant of the Omaha Company and the yards, is a business thoroughfare with double street car tracks and many trucks and [fol. 300] automobiles. Many cars are parked along the curbs of the street, and there are a number of stop and go lights at various corners (Tr. 312). The adjoining prop-

erty is strictly business and industrial. The traffic on Halsted Street is very heavy. Section 977 of the 1931 Chicago Code provides that no person, between 7 A. M. and 7 P. M. shall drive upon any public street or alley within the city more than five head of cattle at any time. The fine for violating the ordinance is not less than $10 nor more than $100 for each offense (Tr. 313). The ordinances also provide that no animal shall be permitted to go loose in any of the public ways in the city, except in enclosed places on private property. The penalty for permitting animals to run at large is not more than $10 for each offense (Tr. 314). Without regard to the ordinance, it would not be practical to drive live stock two and one-half miles north on Halsted Street to the Omaha Company's plant. No live stock purchased by the Omaha Company moves to the Union Stock Yards. Shipments to the Omaha Company plant are billed direct from stations on various lines of railroad. From stations on all lines other than the Burlington, the Omaha Company pays a terminal charge of $2.70, this being the same charge as is assessed at the Union Stock Yards. From points on the Burlington a free delivery the same as made to other Burlington industries under C. B. & Q. Tariff I. C. C. 17660. The Omaha Company has six spur tracks [fol. 301] leading from the main line of the Burlington. Four are used for incoming dead freight and outgoing fresh meat and packing house products. The two westerly tracks are used only for unloading live stock (Tr. 315). There is an unloading platform 10 feet, 8 inches wide, and 496 feet, 6½ inches long, between these tracks. The platform is closed at the north end and has sides consisting of a series of sliding slatted doors. There is room for 11 cars on one side of the platform and 12 cars on the other. Because of the doors, cars can be stopped at any place on the tracks and an opening made at the door of the car. At the south end of the platform the Omaha Company maintains a standard live stock scale similar to those at public stock yards. When live stock arrives at the platform it is unloaded by employees of the Omaha Company and driven to the scale at the south end of the platform where it is weighed by an employee of the Omaha Company. A representative of the Western Weighing & Inspection Bureau checks all weighing. The scale is checked daily by employees of the Omaha Company and twice a year is checked

by representatives of the City of Chicago. The stock is then driven from the scale to holding pens owned and maintained by the Omaha Company which also owns the unloading platform (Tr. 316). On live stock delivered at the Omaha plant no company furnishes any yarding, unloading, [fol. 302] weighing, driving or holding of live stock in pens after it is unloaded. I include in this the Burlington Railroad which performs no service of yarding, unloading, weighing or holding on our animals. In Omaha Packing Company vs. C. M. & St. P. Ry. Co., 37 I. C. C. 378, the charge additional to the line haul rate on live stock to the Union Stock Yards, Chicago (Tr. 317), was prescribed on all shipments of live stock to the Omaha Company not originating on the lines of the Burlington Railroad. On shipments originating on the Burlington the rates prescribed were the line haul rates to Chicago without the $2.00 terminal charge. The percentage increases and reductions have changed this $2.00 terminal charge to $2.70. The Omaha Company has been in its present location from 55 to 60 years, which was many years before it became a subsidiary of Swift & Company. It has 47 pens for unloading live stock which will hold approximately 8,000 hogs. The killing capacity of the plant per day is 4,500 hogs, (Tr. 318). Swift & Company receives direct shipments on live stock at the Union Stock Yards in substantial quantities. When they receive such shipments, the charges, etc., are exactly the same as those described by the witness for the Hygrade Company. There is no difference in the service charges and terminal charges.

Examiner Smith: Anything further, Mr. Rynder?
Mr. Rynder: Not for the interveners.
Mr. Curran: Nothing further (Tr. 319).
[fol. 303] Examiner Smith: Briefs will be due March 1.

(Whereupon the hearing of the above entitled matter before the Interstate Commerce Commission was closed.)

Whereupon, there being no further evidence offered or received, this cause was argued by counsel and submitted to the Court for decision, the hearing therein being closed.

[fol. 303½] Lodged before me this 17th day of Dec., 1934.
Charles Weiser, Clerk.

[File endorsement omitted.]

[fol. 304] IN SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 606

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Dec. 28, 1934

Now come appellants in the above entitled cause, by Frank H. Towner, their solicitor, and file this statement of the points upon which appellants intend to rely and of the parts of the record which they think necessary for the consideration thereof, together with proof of service of the same upon appellees.

Statement of Points to be Relied Upon by Appellants

(1) The District Court erred in finding that the order of the Interstate Commerce Commission, made on July 2, 1934, is not so indefinite and uncertain as to be invalid and void.

(2) The District Court erred in finding that the order of the Interstate Commerce Commission, made on July 2, 1934, is not invalid and void because of the failure of said Commission to make suitable findings upon which its said order might have been properly based.

(3) The District Court erred in failing to find that the said order of the Interstate Commerce Commission, made on July 2, 1934, is invalid and void because of the failure of the said Commission to assign in its said order the reasons for the conclusions reached by it.

(4) The District Court erred in failing to find that said [fol. 305] order of the Interstate Commerce Commission, made on July 2, 1934, is invalid and void because of the failure of said Commission to find in what respects and in what ways, if any, the practices of appellants were in violation of the law.

(5) The District Court erred in finding or assuming that the Interstate Commerce Commission, in its order of July 2, 1934 and in its report constituting a part of said order, made any finding of unreasonableness under Sections 1 and 15 of the Act to Regulate Commerce.

(6) The District Court erred in failing to find that The Union Stock Yard and Transit Company of Chicago was not a common carrier, and that by reason thereof the said order of the Interstate Commerce Commission, made on July 2, 1934, was invalid and void.

(7) The District Court erred in finding that The Union Stock Yard and Transit Company of Chicago rendered transportation services upon the shipments of live stock dealt with in the order of the Interstate Commerce Commission made on July 2, 1934; in finding that the facilities of said The Union Stock Yard and Transit Company of Chicago constitute the live stock terminals of appellants in Chicago, Illinois; and in finding that appellants employed the facilities of the said The Union Stock Yard and Transit Company of Chicago and the services of its employees in effecting the delivery of live stock as a part of appellants' transportation services.

(8) The District Court erred in finding that said order, entered by the Interstate Commerce Commission on July 2, 1934, was made in a case involving an unlawful practice; and that said case did not involve a rate controversy.

(9) The District Court erred in finding that under paragraph (3) of Section 1 of the Act to Regulate Commerce the jurisdiction of the Interstate Commerce Commission ex- [fol. 306] tends beyond a suitable unloading pen in the case of shipments of ordinary live stock in carloads consigned to public stockyards, and in finding that the transportation service performed by appellants upon shipments of ordinary live stock, in carloads, to the Union Stock Yard in Chicago, Illinois, extends beyond suitable unloading pens at such stockyard.

(10) The District Court erred in failing to find that under paragraph (5) of Section 15 of the Act to Regulate Commerce the transportation of ordinary live stock in carloads, consigned to public stockyards, ends when such live stock is deposited in a suitable pen at such public stockyards.

(11) The District Court erred in finding or assuming that the record made in the proceedings before the Interstate Commerce Commission was sufficient to support the order made by said Commission therein on July 2, 1934.

(12) The District Court erred in finding unlawful the collection by The Union Stock Yard and Transit Company of Chicago of the yardage charges dealt with in the said order made by the Interstate Commerce Commission on July 2, 1934.

(13) The District Court erred in finding that the petition of appellants herein should be dismissed and in failing to issue the injunction prayed for in said petition.

Designation of Parts of Record to be Printed

Appellants hereby designate for printing the entire transcript of record filed herein, which they think necessary for consideration in determining the appeal herein, but not including the original exhibits which have been certified to this Court separately and not as part of said transcript of record.

Frank H. Towner, Solicitor for Appellants.

[fol. 307] Service of the foregoing statement of points to be relied upon by appellants upon the appeal herein and designation of parts of the record to be printed, and receipt of a copy thereof, are hereby admitted and acknowledged by the following.

United States of America, by J. Crawford Biggs, Solicitor General, December 28, 1934.

Interstate Commerce Commission, by J. Stanley Payne, December 28, 1934.

Hygrade Food Products Corporation, by Hornblower, Miller, Miller & Boston, December 27, 1934.

[fol. 308] [Endorsed:] Copy rec'd 12/27/34. Hornblower, Miller, Miller & Boston, Attys. for Appellee, H. F. P. Corp.

[fol. 309] [File endorsement omitted.]

[fol. 310] SUPREME COURT OF THE UNITED STATES

No. 607, October Term, 1934

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT—Filed Jan. 17, 1935

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Honorable Court are as follows:

1. The Union Stock Yard and Transit Company of Chicago is not a "common carrier engaged in the transportation of property wholly by railroad" and therefore is not subject to the jurisdiction of the Interstate Commerce Commission.

2. Whether or not subject to the jurisdiction of the Commission the yard company may not lawfully be directed by the Interstate Commerce Commission to "cease and desist" as a consequence of any omission of duty by trunk line railroads to engage the yard company and compensate it for the use of its properties, facilities and protection when shippers take their live stock at unloading pens. The yard company is not party to any joint through rates capable of "division" with railroads under Section 15 (6) of the act; its employment by the railroads is strictly limited to the doing of certain things; and no fault attaches to the yard company if it were to be the duty of railroads to employ its facilities to a greater extent than they have.

3. Section 15 (5) of the Interstate Commerce Act is a complete declaration of railroad duties in delivering live stock at public stock yards under the circumstances in this [fol. 311] case. The Congressional statement of what such duties "include" marks the whole limit of railroad obligation. Because the railroads are willing to deliver live stock to consignees at this public stock yards and in that way and to such extent have made of the yards "their terminal" it does not follow that the railroad duties in respect to such delivery are the same as they would be at yards of their own.

4. The Commission grounded its decision upon an erroneous conclusion of law and did not exert any supposed administrative authority to make findings of "unreasonableness" of a railroad "practice." There are no basic

findings made appropriate to the exercise of any such administrative authority even if such authority existed nor did the record before the Commission contain any evidence sufficient to warrant any conclusion of "unreasonableness."

Charles E. Cotterill, 70 East 45th Street, New York City, Solicitor for Appellant.

[fol. 312] [File endorsement omitted.]

Endorsed on cover: File Nos. 39,234, 39,235. S. New York, D. C. U. S. Term No. 606. The Atchison, Topeka and Santa Fe Railway Company, et al., Appellants, vs. The United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation. Enter Chas. E. Cotterill. Term No. 607. The Union Stock Yard and Transit Company of Chicago, Appellant, vs. The United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation. Filed December 28, 1934. File No. 606, O. T., 1934, 607, O. T., 1934.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Nature of the case and rulings below	1
Statutory provisions sustaining the jurisdiction	3
Date of the decree and date of the application for appeal	4
Cases believed to sustain the jurisdiction	4

Table of Cases Cited.

Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456	4
Hygrade Food Products Corporation v. Atchison, Topeka & Santa Fe Railway Company et al., Interstate Commerce Docket No. 24375	2
Louisville & Nashville Railroad Co. v. United States, 238 U. S. 1	4
Stafford v. Wallace, 258 U. S. 495	4
United States v. The Baltimore & Ohio R. R. Company, 225 U. S. 306	4
United States v. New York Central Railroad Co., 263 U. S. 603	4
Virginian Railway Company v. United States, 272 U. S. 658	4

Statutes Cited.

Act of Congress of October 22, 1913 (38 Stat. L. 220)	2
Act of February 13, 1925, amending Section 238 of the Judicial Code	4
Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 219-220) (28 U. S. C. A. Sec. 47)	3

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 78-351.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

STATEMENT BY PETITIONERS OF BASIS ON WHICH THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE FINAL ORDER OR DECREE ENTERED HEREIN.

Now come The Atchison, Topeka & Santa Fe Railway Company et al., petitioners herein, and present this statement of the basis on which the Supreme Court of the United States has jurisdiction upon appeal to review the final order or decree entered herein on November 2, 1934.

(1) In this suit petitioners sought to enjoin, annul, suspend and set aside an order made by the Interstate Commerce Commission on July 2, 1934, in a proceeding before

it known as its Docket 24375, *Hygrade Food Products Corporation* vs. *Atchison, Topeka & Santa Fe Railway Company et al.* That proceeding involved the propriety and legality of the collection by the Union Stock Yard & Transit Company of Chicago, a defendant therein, of its yardage charges published in its tariffs on file with the Secretary of Agriculture, from Hygrade Food Products Corporation, on shipments of livestock, consigned to said Hygrade Food Products Corporation at the stockyard of the Union Stockyard & Transit Company in Chicago, Illinois, in cases where delivery of such livestock was taken by the consignee at the unloading pens in said stockyard. The order made by the Interstate Commerce Commission in said proceeding on July 2, 1934, requires all defendants therein, including petitioners, to cease and desist, on or before September 25, 1934, from the practice whereby said yardage charges are collected from the Hygrade Food Products Corporation on shipments of livestock in carloads, consigned to it at the Union Stockyard in Chicago, Illinois, in cases where delivery of such shipments is taken at the unloading pens in said stockyard, and awards reparation to said Hygrade Food Products Corporation on past shipments. The effective date of said order was thereafter postponed by the Interstate Commerce Commission to November 5, 1934. After the filing by petitioners of their petition herein, a hearing was had thereon in the District Court, and on November 2, 1934, the court entered a decree dismissing the petition and sustaining the order. The decree of the District Court was a final judgment within the meaning of the Act of Congress of October 22, 1913 (38 Stat. L. 220). On November 2, 1934, petitioners presented their petition for appeal and their assignment of errors, and also their petition for a stay of the order of the Interstate Commerce Commission, pending their appeal to the Supreme Court of the United States and the decision of that Court on such

appeal. On the same day, November 2, 1934, the District Court entered an order allowing the appeal prayed for and an order staying the order of the Interstate Commerce Commission pending such appeal and a decision therein.

(2) The jurisdiction of the Supreme Court of the United States to review said decree on appeal is sustained by the following statutory provisions. The Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 219-220), confers upon the District Courts of the United States the jurisdiction theretofore vested in the Commerce Court, including jurisdiction over all suits brought to enjoin, suspend, annul, or set aside any order of the Interstate Commerce Commission. The same act provides, with reference to an appeal from the final decree of a District Court in such action, as follows:

> "A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (38 Stat. L. 220; Title 28, U. S. C. A., Sec. 47.)

By the Act of February 13, 1925, entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for other purposes," Section 238 of the Judicial Code was amended to provide:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> (4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the

fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission other than for the payment of money." (43 Stat. at L., 938; Judicial Code, Sec. 238; Title 28, U. S. C. A., Sec. 345.)

(3) The decree sought to be reviewed upon this appeal was made and entered on November 2, 1934. The petition for appeal herein together with an assignment of errors was presented, and the order allowing the appeal was entered, on November 2, 1934.

(4) Cases which sustain the jurisdiction of the Supreme Court of the United States to review said decree are as follows:

Virginian Railway Company v. *United States*, 272 U. S. 658.

United States v. *New York Central Railroad Co.*, 263 U. S. 603.

Dayton-Goose Creek Ry. Co. v. *United States*, 263 U. S. 456.

Stafford v. *Wallace*, 258 U. S. 495, 512.

Louisville & Nashville Railroad Co. v. *United States*, 238 U. S. 1.

United States v. *The Baltimore & Ohio R. R. Company*, 225 U. S. 306.

Respectfully submitted,

FRANK H. TOWNER,
Solicitor for Petitioners.

10

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

SILAS H. STRAWN,
RALPH M. SHAW,
E. A. BOYD,
P. F. GAULT,
WALTER MCFARLAND,
J. N. DAVIS,
WALLACE HUGHES,
D. P. CONNELL,
JAMES STILLWELL,
L. H. STRASSER,
FRANK H. TOWNER,
Solicitors for Appellants.

THE DONNELLEY-GARBER PRINTING COMPANY, 350 WEST ADAMS, CHICAGO

INDEX.

Page

Reference to official report of opinion of lower court and to report and order of the Interstate Commerce Commission 2

Statement of the Case 3

Proceedings in the lower court 12

Proceedings in this court 14

Specification of errors 15

Summary of argument 17

Argument:

I. The transportation of interstate shipments of ordinary live stock delivered by appellants at the stockyard of the Yards Company in Chicago, terminates when the animals are unloaded into suitable pens. The order herein assailed is apparently based upon a different view of the law and it is, therefore, void 20

II. Even if the Commission has held that appellants have obligations extending beyond the unloading pens at the stockyard and was right in so holding, the order is void because it imposes upon appellants obligations beyond those imposed by law 49

III. The order and report of the Commission are so indefinite and uncertain and so lacking in essential and basic findings as to be void 54

Conclusion 67

CASES CITED.

Adams v. Mills, 286 U. S. 397 ..... 4, 6, 21, 30, 45
Allied Packers v. Carriers, 144 I. C. C. 377; 161 I. C. C. 641 31
American Asphalt Roof Corp. v. A. T. & S. F. Ry. Co., 156 I. C. C. 147 29
American Express Company v. Caldwell, 244 U. S. 617. 54
Arizona Packing Company v. Carriers, 74 I. C. C. 223. 31
A. T. & S. F. Ry. Co. v. Kansas City Stock Yards Co., 33 I. C. C. 92 63
B. L. S. & W. R. Co. v. United States, 282 U. S. 74..... 66
Burton v. Wabash Railway, 332 Mo. 268; 58 S. W. (2d) 443 ..... 34, 35
Central Stock Yards Company v. Louisville & Nashville R. Co., 192 U. S. 568 44
Chestnut Ridge Railway Company v. United States, 248 Fed. 791 55
Chicago Junction Case, 71 I. C. C. 631..... 4, 6, 61
Chicago Live Stock Exchange v. A. T. & S. F. Ry., 52 I. C. C. 209, 58 I. C. C. 164..... 4, 5, 6, 21, 27, 61, 64, 66
Cincinnati, N. O. & T. P. Ry. Co. v. Rankin, 241 U. S. 319 37
Covington Stock-Yards Co v. Keith, 139 U. S. 128.... ..... 35, 40, 41, 51
Detroit, etc. Bridge Co. v. Corporation, etc. Board, No. 272 October Term, 1934, decided January 14, 1935.. 63
D. G. H. & M. R. Co. v. Commission, 74 Fed. 803..... 55
Ellis v. Interstate Commerce Commission, 237 U. S. 434 63
Emergency Fleet Corporation v. Western Union Telegraph Co., 275 U. S. 415..... 29
Farmers Loan & Trust Company v. Northern Pacific R. Co., 83 Fed. 249..... 54, 55

Florida v. United States, 282 U. S. 194 55
Gobel, Inc. v. B. & O. R. Co., 200 I. C. C. 606 .....34, 36, 52
Illinois Central R. Co. v. Public Utilities Commission, 245 U. S. 493 54
Interstate Commerce Commission v. Chicago Great Western R. R. Co., 209 U. S. 108 37
Interstate Commerce Commission v. D. L. & W. R. Co., 64 Fed. 723 55
Interstate Commerce Commission v. I. C. R. Co., 215 U. S. 452 54
Interstate Commerce Commission v. L. & N. R. Co., 73 Fed. 409 54
Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 63
Interstate Commerce Commission v. U. P. R. Co., 222 U. S. 541 54
Kahn's Sons Co. v. B. & O. R. Co., 192 I. C. C. 705 ....33, 52
Kansas City Southern R. Co. v. Carl, 227 U. S. 639 38
Keystone Elevator & Warehouse Company v. Director General, 73 I. C. C. 273 63
Kiser Company v. Carriers, 17 I. C. C. 430 55
Louisville & Nashville R. Co. v. Maxwell, 237 U. S. 94 .. 37
Omaha Packing Company v. Carriers, 66 I. C. C. 44 31
Pennsylvania R. Co. v. Kittaning Co., 253 U. S. 319 ... 21
Piper v. Blair, 96 I. C. C. 102 .....
Pocket Veto Case, 279 U. S. 655 29
Southwestern Horse & Mule Co. v. Carriers, 129 I. C. C. 730 .....31, 32, 36
Terminal Taxicab Company v. District of Columbia, 241 U. S. 252 .....
Townsend v. Little, 109 U. S. 504 26
United States v. Alabama & Southern R. R. Co., 142 U. S. 615 28

United States, et al. v. Baltimore & Ohio R. Co., et al., No. 221, October Term, 1934, decided Jan. 7, 1935... 55
United States v. Hess, 71 Fed. (2d) 78..... 26
United States v. Interstate Commerce Commission, 265 U. S. 292 63
United States v. Chicago, North Shore & Milwaukee R. Co., 288 U. S. 1 29
United States ex rel. v. Interstate Commerce Commission, 73 Fed. (2d) 948 34
United States v. Robert & Oake, 1 Fed. Supp. 797....54, 55
United States v. New River Co., 260 U. S. 533..... 54
United States v. Union Stock Yard & Transit Company, 226 U. S. 286.....3, 4, 27, 61, 63
Washington v. Miller, 235 U. S. 422..... 26

STATUTES CITED.

Interstate Commerce Act:
Section 1 (3), U. S. C. A., Title 49, Secs. 1 to 15a, p. 46 22
Section 15 (5), U. S. C. A., Title 49, Secs. 1 to 15a, p. 426 .....5, 21
Packers & Stockyards Act, 1921, U. S. C. A., Title 7...6, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF OF APPELLANTS.

MAY IT PLEASE THE COURT:

This case comes to this Court on direct appeal from a final decree of the District Court for the Southern District of New York dismissing the petition of appellants. The action is one by appellants to set aside an order of the Interstate Commerce Commission (hereinafter called the Commission), in which order appellants and the other defendants before the Commission were required to cease and desist from the practice of collecting, on certain shipments of live stock consigned to the Hygrade Food Products Corporation at the Union Stock Yard in Chicago, Illinois, the yardage charges provided for by tariffs of the Union Stock Yard & Transit Company of Chicago, (hereinafter called the Yards Company) filed with the Secretary of Agriculture.

The appellees are the United States of America, the Commission and the Hygrade Food Products Corporation (hereinafter called the Hygrade Company). The Hygrade Company was the complainant in the proceeding before the Commission. A separate appeal, numbered 607, has been perfected by the Yards Company which was also a defendant in the proceedings before the Commission.

1. Reference to Official Report of Opinion of Lower Court and to Report and Order of the Interstate Commerce Commission.

The opinion of the lower court in this case is officially reported at 8 Fed. Supp. 825, and appears in the printed record at pages 54 to 61, inclusive. The lower court made no findings of fact and stated no conclusions of law additional to those contained in its opinion. The case before the Commission was entitled as *Hygrade Food Products Corporation* v. *Atchison Topeka and Santa Fe Railway Company, et al.*, Docket No. 24375. The report of the Commission therein was made on July 25, 1933, is reported at 195 I. C. C. 553, and appears in the printed record at pages 24 to 37. The order attacked herein was made on July 2, 1934, and is not officially reported, but appears at pages 37 and 38 of the printed record.

2. Statement of the Case.

The proceeding before the Commission was initiated by the filing with the Commission by the Hygrade Company, on March 23, 1931, of a complaint naming appellants, the Yards Company and various other companies as defendants (R. 16). Subsequently, an amendment to this complaint was filed by the Hygrade Company (R. 22). The complaint and amendment thereto, after alleging the ownership and operation by the Hygrade Company of a packing house on

the Chicago Junction Railway adjacent to the Union Stock Yard in Chicago, Illinois, further alleged that the Hygrade Company was entitled to the delivery of livestock shipments at that plant on the Chicago rate, plus $2.70 or $1.35 a car, but that such deliveries had been refused; that if any higher rates applied, they were unreasonable and unjustly discriminatory against and unduly prejudicial of complainant.

With respect to such shipments delivered to the Hygrade Company through the stockyard, it was alleged that certain yardage charges collected thereon were inapplicable, not being filed with the Commission; that the services for which such charges were collected were transportation services which defendants were obliged to furnish under Section 15 (5) of the Interstate Commerce Act, and that the yardage charges were not legally collectible from the complainant. Reparation was also asked.

The defendants before the Commission filed answers to this complaint and the case was thereafter heard by the Commission. The facts developed were that the Yards Company was organized in 1865 under a special charter of the State of Illinois, for the purpose, among other things, of building and operating a stockyard and a railroad. Under this authority, the company built a stockyard in Chicago and a railroad which subsequently became known as the Chicago Junction Railroad. The capital stock of the Yards Company was then $1,000,000, of which amount $925,000 had been subscribed by nine trunk line railroads reaching Chicago. These nine railroads subsequently disposed of their stock and for more than fifty years prior to the hearing, no trunk line railroad had any ownership interest in the Yards Company nor any control over its affairs (R. 147). A complete history of its inception, growth, methods of business and operation is contained in the decisions in *United States* v. *Union Stock*

Yard & Transit Company, 226 U. S. 286; *Chicago Live Stock Exchange* v. *Carriers*, 52 I. C. C. 209, and 58 I. C. C. 164; the *Chicago Junction Case*, 71 I. C. C. 631 and *Adams* v. *Mills*, 286 U. S. 397.

When the Yards Company started business in 1867, it established charges known as yardage charges which it collected on all animals which were handled by it or upon its property (R. 162) and also established separate charges for the service of loading and unloading at its platforms all live stock shipped to or from the stockyard by railroad (R. 148). The yardage charges vary, depending on the kind of animal handled (Ex. 23, certified to this Court; R. 152). From the time they were established, the Yards Company has collected its yardage charges from the shippers or consignees of live stock at the stockyard (R. 151), and has collected its loading and unloading charges from the railroads (R. 149). These two charges have always furnished the largest part of the income of the Yards Company.

From the time these charges were established up to the time of the decision of this Court in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286, the Yards Company had never filed any of its charges in tariffs with any regulatory body (R. 148). At the time of that decision, the railroad properties owned by the Yards Company were being operated by the Chicago Junction Railway Company (R. 147). All of the capital stock of the Yards Company and of the Railway Company was then owned by a New Jersey holding company, and principally because of this circumstance, this Court held that the Yards Company was to some extent a common carrier in interstate commerce and thus subject to the prohibitions of the Act to Regulate Commerce. Subsequent to this decision, the Yards Company filed with the Commission tariffs containing its charges for loading and unloading live stock (R.

148). When these tariffs were filed, the Chicago railroads hauling live stock to and from the stockyard amended their tariffs to provide for the absorption and payment by them of such charges for loading and unloading.

In May, 1917, the Yards Company increased its loading and unloading charges by 25 cents per car (R. 148). The railroads declined to absorb this additional charge and the amount of the increase was thereupon collected by the Yards Company from the shippers and consignees of the livestock. This practice was attacked before the Commission in *Chicago Live Stock Exchange* v. *Carriers,* 52 I. C. C. 209, the Commission holding that the obligation to load and unload livestock at the stockyard rested upon the shipper or consignee and that there was no obligation upon the railroads to assume that burden.

On March 1, 1920, there became effective paragraph (5) of Section 15 of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426), which reads as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipment into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards."

Presumably because of this amendment to the law, the Commission, at 58 I. C. C. 164, a rehearing of the com-

plaint made by the Chicago Live Stock Exchange, reversed its decision at 52 I. C. C. 209 and held that the obligation to unload livestock at the Chicago yards rested upon the carriers. Although there had been some changes in the form of the lease of the railway properties from the Yards Company to the Chicago Junction Railway Company at the time these decisions were made, the Commission, nevertheless, held that the Yards Company was still a common carrier and subject to its jurisdiction.

The awards of reparation made by the Commission in the *Chicago Live Stock Exchange Cases* were contested by the Yards Company and the railroads, but were finally upheld by this Court in *Adams* v. *Mills*, 286 U. S. 397. In the meantime the railroads, pursuant to the requirements of Section 15 (5) of the Act to Regulate Commerce, had provided for the absorption and payment by them of the increased loading and unloading charges of the Yards Company filed with the Commission, and this absorption and payment has been made by the railroads ever since.

In 1921, the Packers and Stockyards Act (U. S. C. A. Title 7, Sec. 226) became effective. The stockyard of the Yards Company was posted as a public stockyard under that Act (R. 151), and it published its yardage charges in tariffs filed with the Secretary of Agriculture (R. 152). Since that date those yardage charges have remained on file with the Secretary in such tariffs and at the time of the hearings had before the Commission in the case at bar were under investigation by him (R. 152).

In 1922, the railroad of the Yards Company, operated by the Chicago Junction Railway, was leased to the Chicago River & Indiana Railroad Company for 99 years, with an option to purchase, and the stock of the latter company was purchased by the New York Central Railroad Company, all this being done under authority of the Commission granted in the *Chicago Junction Case*, 71 I. C. C.

631 (R. 148). The New York Central now operates the properties formerly operated by the Chicago Junction and Chicago River & Indiana.

Since this arrangement became effective, the Yards Company has had no direct or indirect connection with any company engaged in the operation of a railroad. Its stock and that of the Chicago Junction Railway Company is still largely held by a New Jersey holding company, and the Yards Company still owns the railroad properties formerly operated by the Chicago Junction Railway Company, but neither the Yards Company, the Chicago Junction Railway Company nor the holding company are engaged in supplying any form of transportation, directly or indirectly, nor have any of those companies any interest, direct or indirect, in any company supplying such transportation. (R. 148).

The operations of the Yards Company have been so successful that its stockyard is now the largest in the world (R. 153). In 1930 it furnished a market for more than 14,000,000 animals (R. 149). Its pens, viaducts and other buildings occupy a large area, and it furnishes all necessary facilities for shipping, receiving, buying, selling, weighing, feeding and otherwise caring for livestock of all descriptions (R. 148, 152). All the large packing companies and numerous smaller ones have plants located immediately adjacent to the stockyard, and while they receive, through the stockyard, some livestock which is consigned to them directly as consignee, they secure most of the livestock used by them by purchases at the stockyard (R. 126). The Hygrade Company operates one of those plants which it acquired some years ago (R. 119). Its plant is immediately north of and separated from the stockyard property by the tracks of the Chicago Junction Railway and the proposed extension of Pershing Road (R. 99).

No trunk line serves the stockyard with its own rails.

Livestock brought into Chicago by appellants is hauled by them with their own power over the line of the Chicago Junction, the only railroad serving the stockyard and the plant of the Hygrade Company (R. 162). The methods followed by appellants in delivering livestock at the stockyard are described in the report made by the Commision herein (R. 29).

Many packing companies having plants adjacent to or adjoining the stockyard, including the Hygrade Company, buy animals in the country and have these animals shipped direct to them, as consignees, at the stockyard where their plants are located. Some of such shipments are turned over at the unloading pens or chutes, immediately after unloading, to representatives of such consignees and are then driven through the tunnels and over the viaducts and other property of the Yards Company to the consignees' plants, sometimes being weighed before being removed from the stockyard (R. 107, 108). Shipments consigned to the Hygrade Company which are delivered in this fashion are removed by it from the stockyard to the Hygrade plant by being driven over a viaduct which belongs to the Yards Company and is built from the property of the Yards Company over the tracks of the Chicago Junction Railway to the property of the Hygrade Company (R. 120, 121).

In cases where shipments consigned to the Hygrade Company are not turned over to representatives of that company at the unloading pens, they are removed by employes of the Yards Company into holding pens and are subsequently taken from these holding pens by the Hygrade Company, at its convenience, and removed to the property of the Hygrade Company over the same viaduct (R. 120). In all cases, however, shipments consigned to the Hygrade Company at the stockyard are removed from the property of the Yards Company by the use of the viaduct, whether taken directly from the unloading pens or subsequently

from the holding pens. The yardage charges of the Yards Company, contained in tariffs filed with the Secretary of Agriculture (Ex. 23, certified to this Court), are assessed by it upon all livestock unloaded by it at the stockyard, without regard to whether the animals are delivered at the unloading pens or chutes to the consignee or are put into holding pens and thereafter removed by the consignee (R. 103, 152).

The rates on livestock to various deliveries in Chicago are made up in various ways. Each appellant publishes the Chicago rate on livestock to facilities located on its own rails in the Chicago Switching district, at which facilities the stock will be delivered to the consignees without any charge additional to the Chicago rate (R. 178, 180). Deliveries at these facilities are seldom required by shippers, due to the fact that they are located some distance from the stockyard, where the livestock market and the plants of the packing companies are maintained. If deliveries were made at such facilities, the animals would have to be transported by truck, or otherwise, to the stockyard, either for sale or for delivery to the packing companies whose plants are all in the stockyard district.

On livestock consigned to the stockyard, appellants' tariffs provide that deliveries will be made to industries, chutes and sidings of the Yards Company for the Chicago rate, plus $2.70 per car on shipments handled by western lines and $1.35 a car on shipments handled by eastern lines (R. 178). By further provision in the same tariff, appellants absorb and pay the loading and unloading charges of the Yards Company (R. 179). Thus, the tariff engagement of appellants, on livestock consigned to the stockyard, is to deliver the animals into the unloading pens or chutes in consideration of the charges specified.

On deliveries of livestock consigned to the plant of the Hygrade Company, or any other industry on the Chicago

Junction Railway in Chicago, the tariffs of appellants provide for the application of the Chicago rate, plus the switching charge of the Chicago Junction Railway. That switching charge amounts to 2 cents per 100 pounds on a minimum weight of 60,000 pounds, so that on such deliveries, the minimum charge of each appellant would be the Chicago rate plus $12 per car (R. 179, 180).

In its report herein, five members of the Commission held (R. 26) that complainant's contention that the Chicago rate, plus $2.70 or $1.35 per car, applied to deliveries made direct to complainant's plant was without merit, and that on such shipments the Chicago rate, plus the minimum switching charge of $12 per car, was applicable. The same Commissioners further held (R. 27, 31) that this charge for such deliveries was not unreasonable, and that there was no discrimination against or prejudice of the Hygrade Company as alleged in its complaint to the Commission.

With respect to shipments consigned to the Hygrade Company at the stockyard, it was said (R. 31) that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens; and that livestock, in carloads, consigned to the Hygrade Company at the stockyards, was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens (R. 31). With respect to all other shipments consigned to the Hygrade Company at the stockyard, it was held (R. 29) that a charge for yardage after the consignee has not taken advantage of any reasonable opportunity to obtain prompt delivery is not a violation of the Interstate Commerce Act, and that if placement into holding pens is desired, an extra charge therefor is not prohibited by Section 15 of the Act (R. 31).

Commissioner Eastman, while concurring in the report, stated his belief that it did not go far enough, since the un-

loading pens did not seem to him to permit a reasonable opportunity to accept and remove the livestock after notice of arrival (R. 31, 32). Five Commissioners dissented (R. 32, *et seq.*) from the conclusion of the majority that yardage charges could not be assessed on such shipments as were turned over to consignees at the unloading pens and immediately thereafter removed from the stockyard without being placed in holding pens, stating their belief that under Section 15 (5) of the Interstate Commerce Act, the interstate transportation of livestock to public stockyards terminates when such shipments are placed in suitable unloading pens at such stockyard; that the yardage charges, the collection of which was found to be improper by the majority, were within the jurisdiction of the Secretary of Agriculture and not within the jurisdiction of the Commission, and that the complaint should be dismissed.

After the issuance of the Commission's report, the defendants in the proceeding before the Commission filed a petition for reconsideration and reargument. On July 2, 1934, the Commission entered the order assailed in this case (R. 37, 38), denying the petition for reconsideration and reargument theretofore filed, and ordering the defendants, including appellants:

> "to cease and desist, on or before September 20, 1934, and thereafter to abstain from the practices described in the aforesaid report which subject complainant (the Hygrade Company) to payment of yardage charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes."

Thereafter, on September 10, 1934, the Commission entered a further order postponing the effective date of its order of July 2, 1934, from September 20, 1934 to November 5, 1934

3. Proceedings in the Lower Court.

The original petition in this case was filed in the District Court for the Southern District of New York on August 14, 1934, the suit being started pursuant to the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913 (U. S. C. A., Title 28, Sec. 170, pp. 652, 653, 656). The petitioners named in that petition were the appellants herein and the Yards Company. The defendants were the United States and the Commission.

Before answers were filed, the Yards Company elected to file another petition for rehearing with the Commission and be dismissed as a petitioner in the court proceeding. An order dismissing it as a petitioner in court was accordingly entered; whereupon appellants filed an amended petition (R. 3, *et seq.*) naming the same defendants.

The amended petition, after setting out the facts, alleges that the order made by the Commission on July 2, 1934 is invalid because of its indefiniteness and uncertainty and lack of necessary findings; that if the Commission intended to and did hold that the interstate transportation of livestock in carloads, consigned to the Hygrade Company at the stockyard, did not terminate when such livestock was placed in suitable pens, the Commission erred in law, there being no obligation upon petitioners to do more under the law than place such livestock into suitable pens at the stockyard; also that if such was the holding of the Commission, the order is void as requiring appellants to furnish at a station on a line of railroad not operated by them, services and facilities which they are not required by the law to furnish.

It is further alleged that the order is void since the Yards Company was not, at the time of the making of said order, a common carrier subject to the jurisdiction of the Commission; that if by its report and order the Commission

intended to and did hold that petitioners should pay to the Yards Company the yardage charges, the collection of which from the Hygrade Company is prohibited, the order is void as requiring the payment by appellants of charges for services performed by the Yards Company over which charges and services appellants have no jurisdiction or control, the services being performed after the interstate transportation of the livestock has terminated; is void as requiring a reduction in the rates charged by appellants for the interstate transportation of livestock, there being no evidence in the record to support such a requirement; and is void for the reason that such charges are not within the jurisdiction of the Commission but are within the jurisdiction of the Secretary of Agriculture.

The defendants filed answers to the amended petition generally alleging the validity of the Commission's order (R. 38, *et seq.*; 42, *et seq.*). Prior to the hearing in the lower court the Yards Company intervened (R. 47), its second petition to the Commission for rehearing having been denied. The Hygrade Company also intervened as a defendant (R. 48) and filed an answer generally alleging the validity of the Commission's order (R. 50 *et seq.*). A final hearing in the case was had in the lower court on October 2, 1934 (R. 95), upon which hearing the entire record made before the Commission was introduced in evidence as Petitioners' Exhibit 1 (R. 96). After hearing, the lower court filed its opinion (R. 54 *et seq.*) on October 30, 1934, upholding the Commission's order in all respects, and on November 2, 1934, entered a final decree (R. 61) dismissing appellants' petition for want of equity.

On the same day, appellants' petition for appeal (R. 63), assignment of errors (R. 64), and motion for a stay of the Commission's order pending appeal were presented (R. 66), and an order was entered (R. 70) granting the appeal upon the filing by appellants of a cost bond in the amount

of $250. This bond was approved and filed November 23, 1934 (R. 71). On November 13, 1934, the lower court entered an order staying the order of the Commission for 30 days from November 2, 1934 (R. 70). On November 23, 1934, an order of severance was entered in the lower court, permitting appellants to prosecute this appeal without joining the Yards Company as a party thereto (R. 73).

On this appeal, all the oral evidence taken in the proceeding before the Commission has been reduced to narrative form under a stipulation of the parties (R. 77) and an order (R. 76) that such narrative is a true and correct statement in narrative form of the oral testimony taken in those proceedings, and that it sets forth in condensed form all oral testimony offered on the trial of the case and which is essential to the decision of all questions presented by the appeal. All of the exhibits received on the hearings before the Commission, and which were included as a part of Exhibit 1 in the lower court, have been certified to this Court as original exhibits and are on deposit with the Clerk (R. 77). In addition, the exhibits numbered 1, 2, 4, 5, 10 to 14, inclusive, 21, 22, 23, and two exhibits furnished to the Commission after the hearings before it had closed, have been reproduced and are submitted to this Court with the printed record.

4. Proceedings in this Court.

On November 15, 1934, Mr. Justice Stone, on motion of appellants and the Yards Company, entered an order (R. 79) staying the order of the Commission pending the determination of this appeal, the order being conditioned upon the filing by appellants and the Yards Company of a stay bond in the amount of $5,000 to be approved by a judge of the lower court and filed in that court. This stay bond was approved and filed in the lower court on December 3, 1934 (R. 80).

The record in the case (R. 95 *et seq.*) was filed in this Court on December 28, 1934, apppellants' statement of points relied upon (R. 185) being filed on the same day. In accordance with paragraph 5 of Rule 12 of the Rules of this Court, a statement of the grounds upon which the jurisdiction of this Court is invoked, filed by appellants in the lower court, was printed and distributed by the Clerk of this Court. On January 14, 1935, this Court entered an order noting probable jurisdiction in the cause.

Specification of Errors.

Appellants make the following specification of errors:

1. The lower court erred in finding that the Commission properly assumed jurisdiction of the yardage charges of the Yards Company under Section 15 (5) of the Interstate Commerce Act; in finding that the Yards Company renders transportation services upon the shipments of live stock dealt with in the order of the Commission, made on July 2, 1934; in finding that the facilities of the Yards Company constitute the livestock terminals of appellants in Chicago, and in finding that appellants employ the facilities of the Yards Company and the services of its employes in effecting the delivery of live stock at the stockyard as a part of appellants' transportation services.

2. The District Court erred in finding that under paragraph 3 of Section 1 of the Interstate Commerce Act the jurisdiction of the Commission extends beyond a suitable unloading pen, in the case of shipments of ordinary live stock in car loads consigned to public stockyards, and in finding that the transportation service performed by appellants upon shipments of ordinary live stock in car loads to the Union Stock Yard in Chicago, Illinois, extends beyond suitable unloading pens in such stockyard.

3. The District Court erred in finding or assuming that the record made in the proceedings before the Commission is sufficient to support the order made by said Commission therein on July 2, 1934.

4. The District Court erred in failing to find that under Section 15 (5) of the Interstate Commerce Act appellants' duties and obligations as common carriers of shipments of ordinary live stock consigned to the Union Stock Yard in Chicago, Illinois, end when such live stock is unloaded into suitable pens at said stock yard; in failing to find that on such shipments there is no transportation service performed by appellants after such shipments have been placed in suitable unloading pens, and in failing to find that the Commission has no jurisdiction with respect to said shipments after they have been unloaded into suitable pens at the Union Stock Yard in Chicago, Illinois.

5. The District Court erred in finding that the order of the Interstate Commerce Commission made on July 2, 1934, is within the power of said Commission and is a proper exercise of power by it, and in failing to find that said order is beyond the power of said Commission, in that it imposes upon appellants duties and obligations beyond those which the law requires them to sustain.

6. The District Court erred in finding that the order of the Commission made on July 2, 1934, is not so indefinite and uncertain as to be invalid and void; in finding that said order is not invalid and void because of the failure of said Commission to make suitable findings upon which its said order might have been properly based; in failing to find that said order is invalid and void because of the failure of said Commission to find in what respects and in what ways, if any, the practices of appellants are in violation of the law, and in finding or assuming that in the said order and in the report constituting a part of said order, said

Commission made any finding of unreasonableness under Sections 1 and 15 of the Interstate Commerce Act.

7. The District Court erred in failing to find that the Yards Company is not a common carrier and that by reason thereof the said order of the Commission, made on July 2, 1934, is invalid and void, and in finding unlawful the collection by the Yards Company of the yardage charges dealt with by the Commission in said order.

Summary of Argument.

I.

It might be concluded from the order made by the Commission and here assailed that the Commission has held that the interstate transportation of ordinary live stock in car loads to the stockyard of the Yards Company does not terminate when such animals are placed in suitable unloading pens at the stockyard, but continues, in the case of live stock delivered to consignees at the unloading pens, until such consignees have had an opportunity to remove such live stock from the stock yard without the payment of any charge additional to the freight rate. If the Commission's report and order is to be given this effect, it is void for the following reasons:

1. Under a proper construction of Sections 1 (3) and 15 (5) of the Interstate Commerce Act and the Packers' and Stock Yards Act, 1921, the transportation of ordinary live stock in car loads to public stockyards terminates when such live stock is unloaded into suitable pens at the stock yard.

2. For many years the consignors and consignees of live stock, the Yards Company, the appellants, the Commission and the Secretary of Agriculture have acquiesced in the

termination of appellants' transportation obligations on such shipments, upon the unloading of the animals into such unloading pens. This construction of the law is now binding upon the Commission.

3. The prior decisions of the Commission and of the courts are in accordance with the theory that under the law, the transportation of such shipments does not extend beyond suitable unloading pens at public stockyards.

4. Appellants, through facilities of their own and located upon their lines of railroad in Chicago, have afforded to consignees of live stock an opportunity to secure delivery of live stock without the payment of charges additional to the transportation charges. Such opportunity is a full compliance by appellants with any obligations which may be cast upon them by the law as the Commission has apparently construed it. The Commission's holding to the contrary is in contradiction to every previous decision by it upon the subject.

5. It is necessary that there be a known ascertainable point at which the jurisdiction of the Commission terminates and the jurisdiction of the Secretary of Agriculture attaches. Ever since the Yards Company has been in operation, that point has been fixed at the unloading pens of the Yards Company, with the acquiescence of every party in interest and of every governmental authority. To give effect to the Commission's order will result in practices which have never before existed and as a practical matter, will create a situation which will make it impossible to definitely determine the rights, obligations and duties of appellants, the Yards Company, the Commission and the Secretary of Agriculture.

II.

Even if the Commission's presumed construction of law with respect to appellants' carrier obligations on shipments of ordinary live stock consigned to the stockyard is correct, the order is void in that it confers upon the Hygrade Company the right to use extraordinary facilities now in existence, the use of which is not necessary to afford free access for the purposes of delivery but only serve to make a delivery more convenient to the Hygrade Company. There is no law which imposes upon appellants the obligation to supply such facilities for use by consignees. The Commission's order, therefore, has the effect of imposing upon appellants duties and obligations in excess of those warranted by any view of the law.

III.

Under the law the Commission is required in its report to make those quasi-jurisdictional findings which the Interstate Commerce Act requires and which are necessary as a foundation for any valid order. It is also under obligation, in making its orders, to make them sufficiently definite so that they may be capable of application by reasonably intelligent people. The report and order in the case at bar does not meet either of these requirements. The Commission has not made any of those findings which the law requires it to make if its order is to be sustained. The result is that the report and order are so vague and indefinite that appellants do not know and could not know what they should do in order to comply with the order. Under these circumstances the order must be set aside.

ARGUMENT.

I.

THE TRANSPORTATION OF INTERSTATE SHIPMENTS OF ORDINARY LIVESTOCK DELIVERED BY APPELLANTS AT THE STOCKYARD OF THE YARDS COMPANY IN CHICAGO, TERMINATES WHEN THE ANIMALS ARE UNLOADED INTO SUITABLE PENS. THE ORDER HEREIN ASSAILED IS APPARENTLY BASED UPON A DIFFERENT VIEW OF THE LAW AND IT IS, THEREFORE, VOID.

It might be assumed, from what the Commission has said in its report in the case at bar, that in its judgment, the transportation of ordinary livestock by appellants to the Hygrade Company at the stockyard does not terminate when the animals are unloaded into suitable pens but continues, in the case of some shipments at least, for some time thereafter. The view of the Commission seems to be that with respect to shipments, delivery of which is taken by the Hygrade Company at the unloading pen and which are thereafter removed from the stockyard without the use of holding pens or the furnishing of a stockyard service, appellants are under an obligation to furnish to the Hygrade Company an opportunity to so remove the livestock without the payment of any charge additional to the freight rate. There is no finding by the Commission to this effect, but on the theory that this was the conclusion of the majority, five Commissioners dissented from the majority report. The lower court also seemed to feel that the Commission had so held for it said (R. 59) that the Commission was right in holding that the charges of the Yards Company, dealt with in the Commission's order, were collected for transportation services. The question presented under this view of the Commission's order is whether or not appellants are under any such obligation with respect to shipments of ordinary livestock delivered by them at the stockyard. We submit that appellants have no such obligation under any consideration of the law and the facts.

(a) Section 15 (5) of the Interstate Commerce Act (49 U. S. C. A., Sec. 15; 41 Stat. 484) which became effective March 1, 1920, reads as follows, in so far as it is here material:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * * Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards."

The general rule is that the duty of loading and unloading carload freight rests upon the shipper or consignee. *Chicago Live Stock Exchange* v. *Carriers,* 52 I. C. C. 209; *Adams* v. *Mills,* 286 U. S. 397, 410; *Pennsylvania R. Co.* v. *Kittaning Co.,* 253 U. S. 319, 323. The railroads serving Chicago relaxed this rule on shipments consigned to the stockyard. From the time the Yards Company started operation until 1917, appellants paid the charges of the Yards Company for loading and unloading livestock at the stockyard. When the Yards Company increased its loading and unloading charges in 1917, appellants refused to pay the increased charges, and this refusal led to the *Chicago Live Stock Exchange Cases,* decided at 52 I. C. C. 209 and 58 I. C. C. 164.

Section 15 (5) of the Interstate Commerce Act was enacted to meet this situation, the immediate cause of the enactment being the desire to make certain the duty of the railroads to absorb all loading and unloading charges of the Yards Company in the future. The effect of the legislation, therefore, was only to define and make certain an obligation which had always been voluntarily assumed by

the railroads theretofore but which they had denied with respect to the increased charges of the Yards Company.

As enacted in 1887, the Interstate Commerce Act provided in Section 1 (24 Stat. 379) that all charges for common-carrier service "or for the receiving, delivering, storage, or handling of such property shall be reasonable and just." In the Hepburn Act, passed in 1906 (34 Stat. 584), the term "transportation" was defined, and this definition was amplified somewhat by the Transportation Act 1920 (41 Stat. 474). The 1920 enactment, however, does not affect the issues in this case. Since 1906, the term "transportation" has been defined (with the exception of bracketed words which were added in 1920) in Section 1 (3) as follows:

> "The term 'transportation' (as used in this Act) shall include (locomotives), cars, and other vehicles, (vessels,) and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Thus, for many years prior to 1920, interstate transportation by common carriers had included all services in connection with the delivery of property transported. Notwithstanding this fact, appellants had never assumed any obligation beyond the unloading pens on livestock consigned to the stockyard. During all these years, consignees paid the yardage charges of the Yards Company with no thought or claim that the services for which the charges were made, performed by the Yards Company after livestock had been placed in unloading pens, were a part of transportation. And during all of the same years the Commission acquiesced in this view. While Section 1 (3) of the Act defines transportation as including all services in connection with delivery, what constitntes delivery is not de-

fined. To determine what constitutes delivery reference must be had to the facts and the law. *Adams* v. *Mills*, 286 U. S. 397, 409, 410.

It was with this background of fact and law that Section 15 (5) was enacted. It only requires that on the livestock therein referred to consigned to public stockyards, the transportation service shall include the service of loading and unloading. Considering the circumstances, it may only be said that it sought, by extension of the railroads' liability, to make certain that obligation which the railroads had denied by declining to absorb the increased loading and unloading charges of the Yards Company. This is plainly indicated by the statement in the paragraph that the transportation referred to "shall include" the loading and unloading. These words constitute a term of extension; that is to say, they operate to extend a previously existing obligation with respect to transportation and delivery.

Because of special conditions affecting the transportation of livestock to public stockyards, Congress saw fit to extend the obligation of the railroads to definitely include services as to which there had been dispute. The paragraph presupposes a delivery of livestock through the use by consignees of the facilities maintained by public stockyards, upon the theory that by specifying delivery at a public stockyard a carrier is informed that the stockyard is to receive the livestock even though they be consigned to a person other than the owner of the stockyard. That this was the theory of Congress is indicated in the Congressional debates had when Section 15 (5) was discussed in Congress. Senator Cummins, after stating the purpose of the paragraph to be the desire of shippers to know definitely from railroad tariffs what they would be required to pay for the transportation of livestock consigned to public stockyards, said (Congressional Record, Vol. 59, part 1, page 674:

"I am entirely in sympathy with the purpose of

> these shippers and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car."

That the purpose of Congress in enacting Section 15(5) was to extend the carrier obligation only to the unloading pen is further indicated definitely by the discussion had in Congress at the time the Packers & Stockyards Act, 1921 (7 U. S. C. A., c. 9; 42 Stat. 159) was under consideration. Section 201 of that Act defines "stockyards services" as follows:

> "The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock."

Thus, it is clear that the receipt, handling and delivery of livestock were intended to be stockyards services. Section 226 of the same Act provides:

> "Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission."

As appears from the dissent to the Commission's report in this case (R. 33), the Chairman of the Committee on Agriculture thus stated the jurisdiction to be conferred upon the Secretary of Agriculture by the Packers & Stockyards Act, 1921:

> "The Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment * * *. Hence it is

proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends."

Thus, Congress apparently thought, both when it enacted Section 15 (5) and the Packers & Stockyards Act, 1921, that on shipments of ordinary livestock to public stockyards it was extending the Commission's jurisdiction to the unloading pen, that being fixed as the farthest limit of the carrier's liability, and that any services thereafter performed by public stockyards in connection with such shipments should be subject to the jurisdiction of the Secretary of Agriculture. Having regard to the facts, this is the only effect which the legislation could be supposed to have. Certainly, the Congress knew that on shipments to public stockyards, railroads had never done more than put livestock in suitable unloading pens. This had been so in the case of the Chicago stockyard for more than 50 years, and it was with particular reference to that stockyard that Section 15 (5) was enacted.

If the legislation be viewed as requiring railroads to do more than deliver livestock into suitable pens at public stockyards, it then necessarily requires such stockyards to perform a service without compensation, or requires railroads to pay for the use by them of facilities which they do not own and which are usually not on their lines of railroad. If Congress had any such intentions, they would have been expressed in plain language, since such requirements would have gone far beyond any obligation theretofore assumed by or imposed upon railroads.

It does not seem to us there is any conflict between Sections 1 (3) and 15 (5) of the Act. As we have said, what constitutes the delivery mentioned in Section 1 (3) is a question of fact and law. It is well known that a carrier's delivery obligations vary with the class and character of commodities. Section 15 (5) only makes it certain that the

delivery of livestock at public stockyards shall include unloading. But even if there were such a conflict, Section 15 (5) would control, it being the later and specific enactment. *Townsend* v. *Little*, 109 U. S. 504, 512; *Washington* v. *Miller*, 235 U. S. 422, 428; *United States* v. *Hess*, 71 Fed. (2d) 78, 79.

(b) A further justification for the construction we claim should be put upon the law lies in the facts. Those facts show that for almost 70 years every interest has conceded a termination of appellants' liability and obligations upon their delivery of livestock into the unloading pens at the stockyard. For that length of time shippers and consignees have paid the yardage charges of the Yards Company without complaint, so far as the record shows. No one has contended that appellants had any obligations beyond those unloading pens, which the report of the Commission in the case at bar specifically states are suitable pens (R. 30).

Acquiescence in this termination of appellants' liability has been evinced by the Hygrade Company, the complainant before the Commission. It purchased its plant adjacent to the stockyard with full knowledge of the methods of operation which had prevailed for many years and with knowledge of those yardage charges of the Yards Company which it would be required to pay on animals received by it through the stockyards. It bought this plant in August, 1929 (R. 119), yet its complaint before the Commission was not filed until March, 1931 (R. 8). In the meantime, so far as the record shows, its only effort to avoid the payment of yardage charges to the Yards Company on any shipments was through the making of demands that livestock consigned to it be delivered at its plant without going through the stockyard (R. 114).

The Commission has also acquiesced in the thought that it had no jurisdiction beyond the unloading pens. As we have said, the view that it now has such jurisdiction re-

quires the assumption that it has had it since 1906, at least. Yet the Commission, up to this time, has never asserted or exercised such jurisdiction, although it has had many occasions for so doing. Thus, after the decision of this Court in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286, the Yards Company, pursuant to the holding of this Court that it was a common carrier subject to the Commission's jurisdiction, filed with the Commission its tariffs covering its loading and unloading charges but did not file any tariffs stating its yardage charges on any shipments. The Commission accepted the tariffs showing the loading and unloading charges apparently upon the theory that they discharged the obligations of the Yards Company with respect to the filing of tariffs with the Commission, and made no demand whatever that tariffs should be filed by the Yards Company stating its charges for any other of its activities.

In its decisions in the *Chicago Live Stock Exchange Case, supra*, the Commission held that the Yards Company was a common carrier and as such was required to maintain its loading and unloading charge tariffs on file with the Commission, but again did not indicate any thought that the yardage charges of the Yards Company should be similarly published. The common-carrier status of the Yards Company being an issue in that case, the Commission might well have required the filing by the Yards Company of tariffs stating its yardage charges, had it felt that in assessing those charges the Yards Company was performing or participating in a transportation service or that there was any transportation of livestock beyond the unloading pens at the stockyard.

That this has been the uniform view taken of appellants' obligations appears not only from the acquiescence of consignees and the Commission but also from affirmative action taken by the Secretary of Agriculture. As appears

from the record in this case, the Secretary of Agriculture initiated an investigation of the Yards Company shortly after the Packers & Stockyards Act, 1921, became effective. Included in that investigation was the question of the propriety and legality of all charges of the Yards Company assessed for stockyards service, including the very yardage charges over which the Commission has apparently asserted jurisdiction in the case at bar. At the time of the hearings had in this case before the Commission, the proceeding before the Secretary of Agriculture was pending (R. 152) and, as a matter of fact, is still pending. The Commission's decision, if it be given the effect of an assumption of jurisdiction over the yardage charges of the Yards Company, creates a direct conflict in jurisdiction as between the Commission and the Secretary of Agriculture.

The yardage charges of the Yards Company are contained in tariffs filed with the Secretary of Agriculture, and the Yards Company is required by the Packers & Stockyards Act, 1921, to collect them. Yet if the Commission's order is sustained, the Yards Company will violate the law by collecting some of those charges. And the Secretary's investigation of those charges is aborted, to some extent, by the Commission's order.

If there were any reasonable doubt as to the proper construction of the statutes here involved, the practical construction of those statutes by the agencies of the Government and by shippers, consignees, carriers and public stockyard companies alike must control. The principles announced in *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615, 621, are applicable here:

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—

should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

In *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415, 418, this Court held that the practical construction given a statute was not only persuasive but decisive of the case, saying:

"For the construction given to the Act by the United States and acquiesced in by the Western Union, having been both contemporaneous and thereafter consistently and widely applied, is not only persuasive but, in our opinion, decisive of the case. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615. Compare *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510."

The doctrine was applied to the Constitution in *The Pocket Veto Case*, 279 U. S. 655, 688, and was applied by the Commission itself in the construction of tariffs in the case of *American Asphalt Roof Corporation* v. *A. T. & S. F. Ry. Co.*, 156 I. C. C. 147, 155.

In *United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, the Government attempted to enjoin the railroad company from issuing any securities or assuming any obligation or liability with respect to the securities of others without first having obtained an order from the Interstate Commerce Commission authorizing it so to do. This Court upheld the carrier's contention that it was not

subject to the security provisions of the Interstate Commerce Act, and held that the Commission's consistent failure to exercise jurisdiction over the carrier's security issues and obligations precluded a construction which would enable the Government to maintain its case. In so holding this Court said (p. 14):

> "The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation."

We submit that under the foregoing, the Commission is now precluded from a holding that appellant's obligations extend beyond the unloading pens at the stockyard. In *Adams* v. *Mills*, 286 U. S. 397, where this Court had under consideration the loading and unloading charges of the Yards Company, it was said at pages 409 and 410:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. The decision of the question was dependent upon the determination of certain facts including the history of the stockyards and their relation to the line haul carriers, the history of the unloading charge at these yards and the action of the parties in relation thereto."

If the same rule be applied in this case, to determine where appellants' carrier obligations end on shipments of ordinary livestock to the stockyard, it must be held that these obligations terminate when such livestock is deposited in suitable pens at the stockyard.

(c) As indicating the proper construction to be placed upon Section 15 (5), we may also refer to prior decisions

of the Commission itself and of the courts. The Commission has held that the final clause of Section 15 (5) did not operate to alter any carrier duty at other than public stockyards. *Omaha Packing Company* v. *Carriers,* 66 I. C. C. 44, 49; *Arizona Packing Company* v. *Carriers,* 74 I. C. C. 223.

In *Southwestern Horse & Mule Co.* v. *Carriers,* 129 I. C. C. 730, the Commission directly passed upon the meaning and effect of Section 15 (5). As appears from the report of the Commission in that case, there were involved charges made for the delivery of livestock at the public stockyard in North Fort Worth, Texas, the facts being practically the same as those in the case at bar. Dealing with the yardage charges there made and the matter of its jurisdiction under Section 15 (5), the Commission said at pages 737 and 738:

> "A careful reading of the amendment to section 15 in the light of prior and subsequent decisions dealing with questions closely related to that here presented leads to the conclusion that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards. It follows that this marks also the limit of our jurisdiction over such shipments. This conclusion is strengthened by consideration of the provisions of the Packers and Stockyards Act, 1921, approved August 15, 1921, and of the decision of the Supreme Court upholding the constitutionality of that act."

This is a definite holding that the limit of the Commission's jurisdiction over shipments of ordinary livestock to public stockyards was the suitable pens into which the animals were unloaded. This decision was followed and approved in *Allied Packers* v. *Carriers,* 144 I. C. C. 377, which presented the case of a public stockyard owned by the New York Central at Buffalo, New York. Passing on its jurisdiction over the yardage charges there involved, the Commission said at pages 381 and 382:

> "Under section 15 (5) of the interstate commerce

act the transportation subject to that act includes 'delivery' of the stock into 'suitable pens' at the stockyards. Defendants were required to unload complainants' shipments into suitable pens, but not to drive them through the chutes and overhead runway to complainants' plant, without additional compensation. In our opinion, therefore, the transportation ended when the stock was unloaded into the chutes or storage pens, if the latter were used, and thereafter it was subject to the provisions of the Packers and Stockyards Act of 1921. See *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730."

Upon rehearing of this case at 161 I. C. C. 641, the previous decision was reversed, but only because the stockyard was the only facility furnished by the railroads through which the delivery of livestock could be made, and because it was owned and operated by a trunk line which served it. In reversing its previous decision in the same case, however, the Commission did not overrule its conclusion with respect to its jurisdiction under Section 15 (5), as expressed in the *Southwestern Horse & Mule Company Case*, 129 I. C. C. 730. On the contrary, it distinguished its ruling in that case by saying at page 645:

"The previous report cites with approval *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730. In that case Division 1 considered the question of the jurisdiction of this commission over yardage charges on shipments of horses, mules, burros, and asses, delivered to dealers through the public stockyards in North Fort Worth, Tex. In several particulars the situation there differed materially from that here presented. The line-haul carriers there did not directly serve the stockyards but shipments were handled to and from the stockyards by a belt railway. The belt railway was not a defendant in that case. The stockyards company at North Fort Worth was a separate corporate entity, totally independent of the trunk lines. The line-haul carriers had adequate and accessible facilities regularly established where delivery of the shipments could have been made without a charge for yardage."

Every ground thus stated for distinguishing the *Southwestern Horse & Mule Company Case* under the decision in the *Allied Packers Case* exists in the case at bar. The stockyard in Chicago is served only by the Chicago Junction Railway, which is a belt line. The Yards Company is now a separate corporate entity, completely independent of any trunk line, and appellants, as we shall hereafter show, have adequate facilities on their own lines where livestock will be delivered without any charge additional to the freight charges.

In *E. Kahn's Sons Co.* v. *Carriers,* 192 I. C. C. 705, the yardage charges at the Cincinnati public stockyard were under attack. With respect to its jurisdiction over such charges under Section 15 (5) the Commission said at pages 709 and 710:

> "In *Southwestern Horse & Mule Asso.* v. *Atchison, T. & S. F. Ry. Co.,* 129 I. C. C. 730, a yardage charge on horses, mules, burros, and asses collected at the public stockyard in North Fort Worth, Tex., by the Fort Worth Stock Yards Company was assailed as unreasonable. This charge was made for the use of the stockyard facilities from the time the animals were taken out of the unloading pens, and for the services rendered, except unloading. In that case it was shown that for several years the line-haul carriers had maintained individual pens and other stockyard facilities at Fort Worth some 2 to 4 miles from the public stockyards that had been and were accessible to and adequate for the traffic under consideration, and that no yardage charge was made for the use of such facilities. We there expressed the view that transportation of ordinary live stock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards and that this marks the limit of our jurisdiction over such shipments. We found that we were without jurisdiction to determine the issues respecting the yardage charges assailed. In that case, as in the instant case, adequate and accessible facilities were provided whereby the consignees could take delivery without additional charges.
>
> We find that the charges assailed are not subject to our jurisdiction. The complaints will be dismissed."

The foregoing denial of jurisdiction by the Commission and its refusal to award reparation was attacked in a petition for mandamus in the Supreme Court of the District of Columbia which dismissed the petition. The decision of that court was affirmed by the Court of Appeals for the District in *United States, ex rel.* v. *Interstate Commerce Commission*, 73 Fed. (2d) 948. As stated by the Court of Appeals (p. 950), the contention of the Commission was:

> "that it decided the issues of fact and denied relief because of a conclusion that under the Act it could not legally require the repayment of money exacted by a stockyards company for yardage services."

This contention was upheld by the Court of Appeals. On January 11, 1935, this Court denied certiorari in the case.

In *Adolf Gobel* v. *Carriers*, 200 I. C. C. 606, the Commission dismissed a complaint against the yardage charges of the public stockyard at Benning, D. C. Dealing with its power under Section 15 (5), the Commission said at page 608:

> "In *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, we found that the transportation of ordinary live stock, in carloads, to public stockyards ends when the animals are placed into suitable unloading pens, and that we had no jurisdiction over the yardage charges. * * * We find that the yardage charges assailed are not subject to our jurisdiction. The complaint will be dismissed."

In *Burton* v. *Wabash Railway Company*, 332 Mo. 268, 58 S. W. (2d) 443, the action was to recover damage to livestock inflicted after the animals had been put into unloading pens at the public stockyard located in East St. Louis. The Supreme Court of Missouri held that the Railroad Company was not liable for such damage, saying [58 S. W. (2d) 446]:

> "The discharge of respondents' cattle from the cars into the unloading pens at the National Stock Yards in East St. Louis was not only a part of the transportation, but it was the last act of fulfillment by appellant of its contract of carriage."

The foregoing is a definite holding that upon placing the livestock there involved in the unloading pens, the Railroad Company had terminated its transportation and completely discharged its obligations. After referring to the Packers & Stockyards Act, 1921, the Court further said [58 S. W. (2d) 447]:

> "The schedule of charges, having been made, by command of the federal law and having received its sanction from the Secretary of Agriculture, was not a mere private price list of the stockyards company. The beneficiaries of the services to be rendered by the stockyards company were by law definitely fixed or ascertainable. The line of demarcation where service to the carrier ends and service to the shipper or consignee begins is exactly determinable. There is no overlapping of zones of service to carrier and shipper, and no form of service that may be rendered by the stockyards company that is not contemplated by law or is not covered by the schedule of charges."

From the foregoing it is plain that in the cases so far decided the opinion has been that under Section 15 (5), a carrier's liability on ordinary livestock transported to a public stockyard terminates when the animals are deposited in suitable unloading pens. It is true that in the *Kahn Case, supra,* and in the *Gobel Case, supra,* the Commission's report shows that ingress and egress were afforded to shippers and consignees at the public stockyards without the payment of any charge, but this factor is not determinative of the legal meaning to be attached to Section 15 (5). As is pointed out in the dissent from the Commission's report (R. 32, 33) since transportation ends at the unloading pens, what occurs thereafter is of no importance.

(d) The decision of this Court in *Covington Stock Yards Company* v. *Keith,* 139 U. S. 128, is largely quoted in the Commission's report (R. 28, 29), presumably in support of the legal proposition that in connection with the transportation of livestock to stockyards, carriers are under

some obligation to afford access to consignees so that they may secure delivery of their livestock without charge additional to the freight rate. The same right of access has been referred to by the Commission in its report in some of the cases we have cited.

In the *Southwestern Horse & Mule Company Case*, 129 I. C. C. 730, the Commission's report (p. 735) recites the fact that the railroads maintained facilities of their own some distance from the public stockyard through which deliveries could be made without charge. In the *Kahn Case*, 192 I. C. C. 705, and the *Gobel Case*, 200 I. C. C. 606, the reports of the Commission state that at the stockyards there involved, an opportunity to secure delivery without charge was afforded consignees.

Even if an opportunity to secure such delivery is essential under the law, the record fails to support the order made by the Commission in the case at bar. The evidence is that appellants maintain facilities on their own rails within the Chicago Switching District, at which facilities delivery of livestock consigned to Chicago will be made without charge additional to the Chicago rate (R. 121, 122).

Moreover, the tariffs of appellants, on file with the Commission and certified to this Court, provide that the Chicago rates will apply on livestock delivered at appellant's facilities. Thus, A. T. & S. F. Tariff No. 6180-K, I. C. C. No. 10680, Items 790 and 800, page 94, definitely states that the livestock station of the Santa Fe in Chicago is located at Corwith and that the Chicago rates published by that road will apply only on deliveries made at that station. Burlington Tariff No. 4636-M, I. C. C. No. 17678, Item 36, page 14, states that the Burlington has unloading facilities for livestock on its rails at Harrison and Canal Streets in Chicago, and at Clyde Station, and that on deliveries at those facilities the Chicago rate will apply.

The tariffs filed by the other appellants contain similar

provisions. Even if there was no proof that appellants maintained such facilities on their own lines, the fact would be presumed from the statements contained in appellant's tariffs and the specific publication of rates to those facilities. *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 209 U. S. 108, 119, 120; *Cincinnati, N. O. & T. P. R. Co.* v. *Rankin*, 241 U. S. 319, 327.

The tariffs of the individual appellants contain no rates on livestock consigned to the stockyard. They refer to Chicago Switching Tariff No. 20-S, I. C. C. No. 82, for a statement of such rates (R. 178). That tariff, also a part of Exhibit 1 certified to this Court, strictly limits the service which appellants will perform on shipments consigned to the stockyard, and specifies the rates that will be charged for such transportation. At page 76, the tariff provides for the assessment of the Chicago rates, plus $2.70 a car on shipments via western lines and $1.35 a car on shipments via eastern lines, on "livestock from or to industries, chutes or sidings of the Union Stock Yard & Transit Company at Union Stock Yards." The chutes referred to in this tariff provision are the unloading pens, which are alternatively known as unloading chutes (R. 150). The same tariff provides that in making delivery into those chutes, appellants will absorb the unloading charge of the Yards Company in the amount of $1.00 per car. Thus, the tariff is plain in providing not only the rate which will be charged for the transportation, but the precise delivery that will be made.

The Hygrade Company was not ignorant of this tariff arrangement when it purchased its plant adjacent to the stockyard and appellants' tariffs, which make the entire arrangement clear, are sufficient to charge the Hygrade Company with knowledge even if it did not otherwise have it. *Louisville & Nashville Railroad Company* v. *Maxwell*,

237 U. S. 94, 97, 98; *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 652, 653.

Thus, the tariffs of appellants offered and now offer an alternative delivery, not only to the Hygrade Company but to all other consignees of livestock transported to Chicago. For the Chicago rate, any consignee has the right to receive his livestock at the facilities maintained by each appellant on its own line. Such a delivery would doubtless be agreeable to any consignee who maintained his packing house adjacent to those facilities. If, however, such consignee desires a delivery at the stockyard, where his livestock can receive such stockyard service and care as may be necessary and where he has the benefit and advantage of the public market, he can secure such delivery into unloading pens or chutes at the stockyard upon payment of $2.70 or $1.35 per car additional to the Chicago rate. Any additional charges made by the Yards Company must be paid by him. Or, if the Hygrade Company or any other consignee located on the Chicago Junction Railway desires delivery at its plant, it can secure such delivery by paying the Chicago rate plus the switching charge of the Chicago Junction (R. 178, 179). This rate was held reasonable by the Commission in the case at bar (R. 27).

Appellants do not, however, hold themselves out to deliver livestock consigned to the stockyard, at any other point than at the unloading chutes. From there on, the consignees must take care of any charges which may accrue, and since 1867 they have paid, without objection, the yardage charges assessed by the Yards Company. With respect to this situation, the Commission said in its report (R. 26):

> "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for un-

loading livestock, the use of which by complainant is impractical."

There is no allegation in the complaint of the Hygrade Company filed with the Commission of any failure on the part of appellants to maintain suitable and sufficient facilities of their own in Chicago where livestock may be delivered. Nor was there any complaint that their use was impractical. There was simply no issue with respect to these facilities whatsoever.

The statement by the Commission that the use of appellants' facilities by complainant is impractical is plainly wrong, and must be based entirely upon the statement of one of complainant's witnesses, who, after saying that he could get delivery on the Chicago & North Western at Proviso, said that the reason he did not do so was because it was too far away and thus impractical (R. 121). Admitting that he could get delivery at the facilities maintained by the individual appellants on the Chicago rate, he said that he could also get delivery at Clinton, Iowa, which would be cheaper and just about as convenient (R. 122). Thus, all that can properly be said is that deliveries at appellants' facilities are not convenient from the standpoint of the Hygrade Company.

The fact is that the Hygrade Company located itself in a plant immediately adjacent to the property of the Yards Company in order to serve its own convenience. Of necessity it purchases most of the livestock used by it at the public market maintained by the Yards Company (R. 126). If its plant was located anywhere but at the stockyard, the livestock necessarily bought by it at the stockyard would have to be trucked to that plant. The location of its plant at the stockyard makes it equally inconvenient for the Hygrade Company to receive livestock through the facilities owned by appellants, since such stock must be driven or

trucked from those facilities to its plant adjacent to the stockyard. Its complaint to the Commission was nothing more than an effort on its part to impose upon appellants or the Yards Company some portion of the burden with respect to deliveries, which burden necessarily resulted from the location of its plant at the stockyard.

We know of no rule of law requiring carriers to locate their facilities with reference to the convenience of one consignee only. All the individual facilities owned by appellants are in the Chicago switching district (R. 121, 122) which, from a rate and delivery standpoint, is Chicago, and this is sufficient to meet all requirements of the law. In the *Keith Case*, 139 U. S. 128, this Court said at page 136:

> "We must not be understood as holding that the Railroad Company in this case was under any legal obligation to furnish or cause to be furnished suitable and convenient appliances for receiving and delivering live stock at every point on its line in the City of Covington where persons engaged in buying, selling or shipping live stock chose to establish stockyards."

It should be remembered that appellants do not insist that livestock transported by them be delivered at the stockyard. It is a matter of no moment to them where such stock goes. The transportation to the stockyard is performed by appellants only because the shipper or consignee requires it. There is no material difference presented by the facts with respect to deliveries at the stockyard than would be presented by the case of a shipper consigning goods to a consignee on a private switch track located at the plant of a third party. In such case, the carrier must transport the goods to the destination named by the shipper, and has the right to assume that the consignee has made some arrangements for the use of the third party's track and property as the place of delivery. Certainly, it would be no fault of the carrier if the third party insists

upon compensation for the use of his property before permitting a delivery to be taken by the consignee.

It must also be remembered that the stockyard is an industry on the line of the Chicago Junction and not upon the line of appellants. Appellants operate over the Chicago Junction under a trackage arrangement. We think it must be conceded that in the absence of such an arrangement no shipper or consignee could have compelled appellants to operate with their own power over the rails of the Chicago Junction in order to reach the Union Stock Yard. Their action in this respect is entirely voluntary on their part. As conditions to this voluntary service, appellants have provided in their tariffs a higher rate and have limited their service to a delivery into the unloading pens or chutes at the stockyard. Notwithstanding these conditions, the Commission has apparently undertaken to impose upon appellants the maximum obligations which they would sustain at points on their own rails. To do so is obviously not just.

With respect to the maintenance by appellants of their own facilities, the Commission said (R. 28):

> "The fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards."

The only authority quoted in the Commission's report for this extraordinary statement of law is the decision of this Court in *Covington Stock Yards Company* v. *Keith*, 139 U. S. 128. In that case Keith alleged that he had his own facilities for receiving livestock and prayed that the receiver of the Kentucky Central Railroad be required to show cause why he should not deliver livestock consigned to Keith at some suitable place outside the yards of the Covington Stock Yards Company free from other than the

customary freight charges. By a contract with the Stockyard Company the railroad had arranged for the use of the facilities and employees of the stockyard company for loading and unloading all livestock delivered to the stockyard company by the railroad, and the railroad had agreed to make the stockyards its depot for delivery of all livestock and not to build nor allow to be built on its premises any other yards for the receipt of such stock. The railroad had provided no facilities at Covington for receiving and delivering livestock except those of the stockyard company.

The lower court in its decree which was affirmed by this Court on review, found that the railroad had failed to provide a depot for livestock other than the yards of the stockyard company and ordered

> "that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson, at and through the said Covington stockyards all such livestock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stockyards, in writing, that it may be so done, being filed in this court."

It was further provided that

> "in default of such consent being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the livestock switch of said railroad company north of said stockyards the said railroad company and said receiver shall receive and deliver all such livestock to said Keith and Wilson as shall be consigned to them or either of them or be offered by them or either of them for shipment at said platform."

Thus, the decision in the *Covington Case* turned on the fact that the railroad had not provided any facilities for unloading livestock except those of the stockyard company. The court recognized the fact that it could not compel the

stockyard company to permit the use of its facilities by the railroad without its consent. Instead, the court ordered the railroad and its receiver to make delivery at the facilities of Keith and his partner if the stockyard company would not permit the use of its property free of charge. Near the conclusion of the opinion of this Court, the fact that the decision was grounded on the failure of the railroad to furnish facilities of its own where delivery without extra charge could be had clearly appears from the following language (p. 136):

> "But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards * * *."

It is thus quite obvious that a different conclusion would have been reached if the railroad had furnished facilities of its own at which livestock could have been shipped and received without additional expense for yardage.

The Commission's conclusion in the case at bar is also at variance with its previous decisions on the same point. In the *Southwestern Horse & Mule Company Case, supra,* the maintenance of other facilities by the railroads, under precisely the same circumstances as obtained in Chicago, was held by the Commission to be sufficient, and the decision of this Court in the *Covington Case, supra,* was distinguished upon this express ground. In the *Kahn Case, supra* and the *Gobel Case, supra,* free access at the stockyards there involved was held to be sufficient. The two latter cases do not hold, however, that free access must be afforded a consignee at a public stockyard. Free access at public stockyards was involved in those cases only because the public stockyards were the only places where there were

facilities at which livestock could be delivered. Had the railroads owned facilities of their own, as in the *Southwestern Horse & Mule Company Case, supra,* or as in the case at bar, free access at the stockyards would not have been necessary even in the Commission's view.

In *Central Stock Yards* v. *Louisville & Nashville Railway Company,* 192 U. S. 568, an effort was made to compel the Louisville & Nashville Railroad to receive and transport livestock to a stockyard upon the line of the Southern Railway, a connecting line of the Louisville & Nashville. The Louisville & Nashville maintained its own yard on its own rails. This Court held that there was no obligation upon the Louisville & Nashville to extend its transportation of livestock to a stockyard on the line of a connecting carrier, saying at page 571:

> "If the cattle are to be unloaded, then, as was said in *Covington Stock Yards Company* v. *Keith,* the defendant has a right to unload them where its appliances for unloading are, and cannot be required to establish another set hard by."

Thus, appellants having established their own facilities for unloading livestock in Chicago, cannot be compelled to establish, at the stockyard, another set of facilities at which they incur all obligations incurred by them at their own facilities. In order to suit the convenience of consignees, appellants have undertaken to transport livestock to the stockyard but have never undertaken to do more than put such livestock in unloading pens at that point. We submit that they cannot be compelled to do more at the stockyard than they now do. If the Hygrade Company or other consignees desire the convenience and advantage of deliveries at the stockyard, they must receive those deliveries under the conditions established when appellants voluntarily extended their service to that point. If, however, consignees do not desire deliveries at the stockyard under the

conditions fixed by appellants' tariffs they should take the deliveries at appellants' facilities. Appellants' obligations at the stockyard cannot be enlarged merely because appellant's owned facilities do not suit the convenience and desires of consignees.

The Commission also held (R. 26) that the stockyard was the livestock terminal of appellants at Chicago. This is not entirely true in fact. The livestock terminals of appellants in Chicago are the facilities maintained upon their own rails. It is true that the stockyard is also a livestock terminal of appellants, but it is only so to a limited extent; that is to say, only to the extent specified by appellants' tariffs.

This Court, in *Adams* v. *Mills*, 286 U. S. 397, 409, also said that at Chicago, the stockyard is the terminal of the line haul carriers, but that statement was only made in connection with the obligation of those carriers to load and unload livestock at the stockyard, a duty now imposed upon them by Section 15 (5). It is true that in making deliveries of livestock at the stockyard appellants must and do use the facilities of the Yards Company. But their use of those facilities to the extent now required by law does not make the stockyard a terminal of appellants at which they are required to sustain the maximum obligations imposed upon them at points on their own lines.

Surely, some consideration must be given to the conditions imposed by appellants when they voluntarily undertook to make deliveries at the stockyard with their own power. If these conditions are to be disregarded, the right of appellants to cancel the present rate and trackage arrangements must be conceded. If that were done, deliveries of livestock on the Chicago rate would only be made at the facilities maintained by each appellant. The rate to the stockyard would be the Chicago rate, plus the switching charges of the Chicago Junction Railway, and certainly

it would be reasonable, since in this case the Commission has approved it for application on shipments delivered at the plant of the Hygrade Company.

We submit that if there is any obligation upon appellants to furnish free access to consignees of livestock, they discharge that obligation at Chicago by furnishing such free access at their own facilities; and that they are under no obligation to do so at the stockyard, which is a station not on their lines of railroad. In apparently holding to the contrary the Commission has been compelled to disregard the facts, the plain provisions of appellants' tariffs, the decisions of this Court, and its own previous decisions on the same subject.

(e) The practical effect of what seems to be required by the Commission's order is also of substantial importance. As we have pointed out, for about 70 years the existing methods of doing business at the stockyard have obtained. Over that period of time appellants have done nothing more than deliver livestock at the stockyard into unloading pens or chutes. From that point onward consignees, including the Hygrade Company, have always paid the yardage charges of the Yards Company on each shipment so delivered. Under this method of doing business the Yards Company has grown until it now operates the largest stockyard in the world. The utmost speed and precision is required in the operation of appellants and the stockyard in order that the daily volume of livestock can be handled without delay or damage to the animals (R. 156).

Anything which complicates or makes more difficult the present arrangements would be most serious. The Commission's order, if sustained, will produce precisely that effect. It prohibits the collection of yardage charges upon all ordinary livestock in carloads consigned to the Hygrade

Company, in instances where delivery of such livestock is taken at the unloading pens, but under the Commission's report, such yardage charges may be assessed against animals put into unloading pens for storage or given any service by the Yards Company after the unloading. Thus, as a practical matter, in order to determine what charges should be assessed against each shipment, it will be necessary to follow it closely from the time it comes out of the car until it leaves the stockyard, in order to determine what is done with it.

The Court should understand that in the early morning hours of each day livestock is unloaded at the stockyard at the rate of approximately one car every two minutes (R. 167). Livestock unloaded into the unloading pens must be immediately removed to make room for succeeding carloads (R. 149). We may assume that in some cases consignees will be at the unloading pen ready to take their animals. It will thus be necessary, in connection with all such shipments, not only to effect a delivery at the unloading pen but thereafter to supervise such shipments in order to determine definitely that they are removed from the stockyard without receiving any of that service which the Commission has said would justify the imposition of a yardage charge. Only by so doing could appellants or the Yards Company determine the circumstances under which it would be proper to assess a charge. To do this will add substantially to the expense of deliveries at the stockyard, will produce confusion and as a matter of fact will be wholly impractical.

There is a further consideration. At the stockyard, the point where the jurisdiction of the Commission ceases and the jurisdiction of the Secretary of Agriculture begins must necessarily be determined. There must be a definitely ascertainable line of demarcation between these two juris-

dictions if either law is to be capable of practical application and enforcement. Drawing that line at the unloading pen is certainly a convenient and practical method of determining the jurisdiction of each agency. It is the point at which the line has been drawn by every interest for the last fourteen years and during this period there has been no difficulty whatsoever. The order of the Commission will destroy this certainty and will substitute for it doubt and uncertainty with respect to many shipments delivered at the stockyard.

The question of whether or not the yardage charges of of the Yards Company will apply to any shipment must necessarily be left, under the Commission's order, to the determination of individuals who will not be qualified to make such determination, since close questions of fact and law will be involved in each case. The service subject to the Commission's jurisdiction and that subject to the jurisdiction of the Secretary will be incapable of practical ascertainment. Such a condition is not fair to appellants or the Yards Company, and certainly is not conducive to an exact understanding by the Secretary and by the Commission on the subject of the jurisdiction possessed by each of them.

From all the foregoing we submit that on shipments of livestock to the stockyard, appellants' obligations terminate when the animals are deposited in the unloading pens. That this was intended by the enactment of Section 15 (5) of the Interstate Commerce Act in 1920 and the enactment of the Packers & Stockyards Act in 1921 seems clear, since it is consistent with the uniform practice which has obtained for 70 years, and with the result sought to be produced by the enactment of Section 15 (5). It is the only conclusion which accords with the language used in the two laws, and is supported by the decisions of the courts and the Commission. It is a conclusion acquiesced in by the Commis-

sion since 1906. And in this case, it is a conclusion compelled by the fact that appellants maintain their own facilities where consignees may secure the rights now sought on deliveries made at the stockyard. Since the Commission's order in this case apparently imposes upon appellants burdens and obligations in excess of those which the law requires them to assume, it must be set aside.

II.

EVEN IF THE COMMISSION HAS HELD THAT APPELLANTS HAVE OBLIGATIONS EXTENDING BEYOND THE UNLOADING PENS AT THE STOCKYARD AND WAS RIGHT IN SO HOLDING, THE ORDER IS VOID BECAUSE IT IMPOSES UPON APPELLANTS OBLIGATIONS BEYOND THOSE IMPOSED BY LAW.

In the report of the Commission it is said (R. 25):

> "Complainant's plant lies directly north of the unloading pens of the Union Stock Yards which are operated by the Union Stock Yard & Transit Company. There is a connecting subway under a public highway through which livestock are driven from the yards to the plant."

This statement of the Commission is not in accord with the record. As appears from Exhibits 1 and 18 filed with the Commission (R. 99, 133) and certified to this Court (R. 76, 77) the plant of the Hygrade Company is immediately north of the property of the Yards Company and is separated from that property by the tracks of the Chicago Junction Railway and by the proposed extension of Pershing Road or 39th Street. 39th Street, however, is not yet constructed at this point (R. 99), and consequently there is no public street intervening between the property of the Yards Company and the plant of the Hygrade Company.

The evidence is clear that while there is a tunnel under the proposed extension of 39th Street (R. 121), the Hy-

grade Company has always removed its animals from the property of the Yards Company to its own plant by the use of an elevated driveway or viaduct which extends from the property of the Yards Company over the pens and the Chicago Junction tracks to the property of the Hygrade Company (R. 120, 121). The viaduct is owned by the Yards Company and is used for all stock driven directly from the unloading chute or pen to the plant of the Hygrade Company (R. 121). The order of the Commission assailed herein prohibits the collection of the yardage charges of the Yards Company on all shipments of—

> "livestock in carloads consigned to complainant at Union Stock Yards in Chicago, in instances where delivery is taken at the unloading pens provided for such purposes."

This language confers upon the Hygrade Company the right to a delivery of livestock without the payment of yardage charges, even in cases where such animals are then removed from the property of the Yards Company by the use of the viaduct over the pens and the Chicago Junction tracks. Presumably, this is the right which the Commission intended to confer upon the Hygrade Company, as the evidence is clear that the viaduct is used on all livestock driven directly from the unloading pens to the Hygrade Company plant (R. 121), and reparation is awarded to the Hygrade Company on livestock so delivered in the past.

The evidence is equally clear, however, that livestock can be taken from the stockyard to the plant of the Hygrade Company without the use of any special facilities such as the viaduct which has been and is now used. The same Exhibits 1 and 18 show that Exchange Avenue, which is a private street within the limits of the Yards Company property, opens into Halsted Street on the east and into Racine Avenue on the west. Livestock unloaded into the stockyard can be taken away from it at either of these

points into a public street by being driven through the streets and alleys of the Yards Company.

This cannot be done on the north side of the stockyard, as Laurel Street, which is a private street of the Yards Company, only extends to the south side of the Chicago Junction tracks, which lie across the north side of the stockyard. Morgan Street, on which the Hygrade Company plant is situated, only comes as far south as the north line of 39th Street or Pershing Road extended. A delivery of livestock on the north side of the stockyard, without the use of the viaduct, would therefore require the use of property not within the stockyard and which is privately owned by parties other than the Yards Company.

With respect to appellants' obligations on shipments of livestock to the stockyard, the Commission, while making no findings, apparently had the idea that if the consignee was ready to remove the livestock when it was unloaded, without receiving any stockyard service, he was entitled under the law to so remove it without charge additional to the freight rate. That was the demand made by the Hygrade Company on the hearing before the Commission (R. 123, 125, 126) and is the effect of the order made.

Even if the Commission was right in thus granting the right to remove livestock from the stockyard without additional charge, we submit that there is certainly nothing in the law which confers upon a consignee the right, in removing such livestock, to the use of costly, extraordinary facilities which are not necessary to the mere right of free removal but are used only to serve the convenience of consignees. The Hygrade Company did not take the position that it was entitled to the use of such facilities as a part of such free egress, and we know of no legal requirement that they be furnished. Even in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, the decision in which was freely quoted by the Commission (R. 28, 29), no such requirement

was laid upon the carriers. And in the case at bar, an additional charge against the Hygrade Company is not prohibited if shipments of livestock consigned to it at the stockyard are put into holding pens (R. 30, 31). As extraordinary facilities, such pens are in the same class as the viaduct in question.

These circumstances demonstrate the incorrectness of the Commission's statement (R. 31) that

> "It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens."

This matter was referred to in the dissent from the Commission's report, where it was correctly said (R. 35):

> "Among the many facilities furnished by the stockyards company is an elevated driveway through which complainant's livestock may be and is driven directly to its plant * * *. It is for the use of this and other facilities of the stockyards company that the charges complained of are assessed."

It may be conceded that allowing the Hygrade Company free egress from the stockyard to Halsted Street or Racine Avenue will not be so convenient as egress through the use of the viaduct. Animals removed through Halsted Street or Racine Avenue would have to be driven or trucked considerable distances through public streets. But the convenience of the Hygrade Company cannot be made the measure of appellants' obligations. In *E. Kahn's Sons Co.* v. *B. & O. R. Co.*, 192 I. C. C. 705, and *Adolph Gobel Inc.* v. *B. & O. R. Co.*, 200 I. C. C. 606, the same sort of free egress was held by the Commission to be sufficient. And at stations on their own lines appellants are certainly not required to furnish consignees of livestock anything more than the mere right to remove the animals.

The extra-legal right conferred upon the Hygrade Company by the order here attacked is of substantial import-

ance to appellants. If it is to be assumed that appellants are under some legal obligation to furnish free egress on shipments of livestock consigned to the Hygrade Company at the stockyard, and coming within the terms of the order here attacked, they will be required to furnish this egress by the use of property belonging to the Yards Company. The Yards Company will naturally require the payment to it of some compensation for such use of its property, and the amount of that compensation will necessarily be determined by the character of the facilities which it is necessary to devote to the use. It is quite apparent that the charge to appellants for the use of stockyard streets and alleys in order to permit free egress of livestock to Halsted Street or Racine Avenue would be considerably less than the charge for using not only those streets and alleys but also a special facility such as the viaduct now used by the Hygrade Company. Thus, the right conferred upon the Hygrade Company by the order will be a real source of expense to appellants additional to that which they should sustain even under the Commission's view of the law.

It has never been contended in this case, or in any other case so far as we know, that a consignee is entitled to more than the right to remove his property from railroad premises without charge additional to the freight rate. No argument has been made that in order to make such removal more convenient to consignees, a railroad is required to furnish special facilities which are not necessary to the right of free removal but only make it more convenient to consignees. Even if the construction which we assume the Commission has placed upon the law is correct, we submit that the order, in conferring the right of free egress upon the Hygrade Company in designated cases, should have limited the right and should not, as it does, permit the free use by the Hygrade Company of an extraordinary facility such as the viaduct now used by it. Since the Com-

mission has not so limited the right conferred upon the Hygrade Company, its order herein imposes upon appellants obligations which are not imposed by law, even under the Commission's construction of that law. For this reason, if for no other, the order should be set aside. *United States* v. *New River Co.*, 265 U. S. 533, 540; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 471.

III.

THE ORDER AND REPORT OF THE COMMISSION ARE SO INDEFINITE AND UNCERTAIN AND SO LACKING IN ESSENTIAL AND BASIC FINDINGS AS TO BE VOID.

It is well settled that if the order attacked herein is not so definite and certain as to preclude misapprehension, it will be set aside. The rule on this subject was laid down by this Court in *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, in which case the Commission undertook to prescribe rates for intrastate application. This Court set aside the order of the Commission because of its uncertainty, saying at page 510:

> "We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates established and maintained under a law of the State, and therefore that the suits by the carriers were rightly dismissed on the merits."

The same conclusion was reached in *Interstate Commerce Commission* v. *L. & N. R. Co.*, 73 Fed. 409, 415; *Farmers Loan & Trust Company* v. *Northern Pacific R. Co.*, 83 Fed. 249, 252, 253; *United States* v. *Roberts & Oakes*, 1 Fed. Supp. 797, 799; and *American Express Company* v. *Caldwell*, 244 U. S. 617, 627. The Commission itself has recognized its obligations in this respect in *Kiser Company*

v. *Carriers,* 17 I. C. C. 430, where it was held, at page 442, that an order of the Commission must be specific and definite if it is to be enforceable under the law.

Nor can the courts correct an order which is subject to this defect. In *Interstate Commerce Commission* v. *D. L. & W. R. Co.,* 64 Fed. 723, the Court said at page 723:

> "The court cannot substitute, for an order actually made, one such as the commission might or should have made, or such as the commission intended to, but failed to, make."

In *D. G. H. & M. R. Co.* v. *Commission,* 74 Fed. 803, it was held (page 841) that there was no power in the Circuit Court to modify or change the order of the Commission. To the same effect are the decisions in *Chestnut Ridge Railway Company* v. *United States,* 248 Fed. 791, 802; *Farmers Loan & Trust Company* v. *Northern Pacific Ry. Co.,* 83 Fed. 249, 253; *United States* v. *Roberts and Oake,* 1 Fed. Supp. 797; and *Florida* v. *United States,* 282 U. S. 194, 215.

It is equally certain that if an order of the Commission is to be sustained it must be supported by basic or essential findings. In *Florida* v. *United States,* 282 U. S. 194, this Court set aside an order of the Commission because of the lack of findings required to support the Commission's order. This Court said at page 215:

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The foregoing rule has been lately reaffirmed by this Court in *United States, et al.* v. *Baltimore & Ohio R. Co., et al.,* Number 221, October Term, 1934, decided January 7, 1935. In that case, the decision of the lower court setting aside an order of the Commission was affirmed. Dealing

with the power of the Commission to require specified changes in locomotive equipment in order to eliminate unnecessary peril, this Court said:

> "The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the exercise of authority to promulgate the rule * * *."

Pointing out that, in the case presented, the lack of findings by the Commission left the basis of the order to inference, this Court concluded:

> "It is true that formal and precise findings are not required, under Sec. 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision' * * *. But section 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity."

The rules prescribed in the foregoing cases have application to the case at bar. In this case, there were presented to the Commission for determination, among other issues, the question whether any of appellants' rates or practices were unreasonable or otherwise in violation of the law; the rights and obligations of appellants under Section 15 (5) of the Interstate Commerce Act on shipments of livestock consigned to the Hygrade Company at the stockyard; the question of jurisdiction, as between the Commission and the Secretary of Agriculture, over the yardage charges of the Yards Company; the question whether or not the Yards Company was acting as a common carrier in performing the services for which it collected the yardage charges condemned by the Commission; and the question whether the Yards Company, in collecting the yardage charges condemned by the Commission, was acting in its own behalf or as the agent of appellants. The determination of all these issues was essential to the entry of any valid order;

yet the Commission made no finding with respect to any of them. Even in presenting our other argument in this case, we have been compelled to assume the effect of the Commission's order.

The conclusions of the Commission on these issues may, perhaps, be inferred from what it did, but such inferences are not sufficient to support the order. Thus, it may be inferred that the collection of the yardage charges involved constituted some violation of law by appellants, since the further collection of those charges is prohibited; but nowhere in the report and order is there any finding to that effect or a statement of what law was violated. The lower court, apparently recognizing the necessity of some finding on the subject, assumed that the so-called practice condemned by the Commission had been found to be unreasonable, for it said (R. 57) that the Commission—

> "has been given jurisdiction over unreasonable practices of carriers engaged in interstate transportation."

But this was pure assumption by the lower court, for there is no finding or statement by the Commission that the "practice" condemned by it is or was unreasonable. The practice of collecting the yardage charges was alleged by the Hygrade Company (R. 23) to be unreasonable, in violation of Section 1 of the Interstate Commerce Act, and the charges were alleged to have been collected without proper tariff authority in violation of Section 6, and to have been improperly collected from the Hygrade Company in violation of Section 15 (R. 21). Certainly, a finding by the Commission that one or more of these sections of the law had been violated by the collection of the charges was a prerequisite to an order condemning their collection. Without such a finding, the Commission had no power to enter the order. Under Section 15 (1) of the Interstate Commerce Act, the Commission has power to prohibit a practice, if it is of opinion that such practice is "unjust or un-

reasonable or unjustly discriminatory or unduly preferential or prejudicial," or otherwise in violation of any provision of the Act. In this case the Commission has not said that the practice condemned by it violates the law in any of the respects named. The Commission did say (R. 31):

> "It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens."

This statement is an error in fact, as we have already shown. And in any case it is not such a finding with respect to the yardage charges as gives the Commission power to prohibit the collection of those charges.

It may be inferred that the Commission made some determination of appellants' obligations under Section 15 (5) of the Act, but there is no finding or statement from which that determination may be ascertained. With respect to this paragraph of the law, the Commission only said (R. 28) that under it—

> "no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock."

This statement could not refer to the yardage charges, as they have never been made for the placing of livestock into suitable pens at the stockyard. The charge made for placing animals into suitable pens is the unloading charge, which is now and always has been paid to the Yards Company by appellants and not by consignees, and the report states that the unloading pens are suitable. Certainly, the report and order do not constitute a determination of the time when appellants' transportation obligations under Section 15 (5) of the Act end on shipments of livestock consigned to the Hygrade Company at the stockyard. The report states (R. 29) that yardage charges may be assessed

against consignees if advantage is not taken of a reasonable opportunity to obtain prompt delivery, and that what constitutes a reasonable opportunity may be determined from the circumstances at particular yards.

The "reasonable opportunity" thus stated is not prescribed definitely, so that in all cases, the employees who unload livestock at the stockyard will be required to guess whether each shipment is or is not properly subject to the yardage charges. This uncertainty is aggravated by the finding in the report (R. 31) that

> "livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

This finding is carried into the order, which prohibits the collection of the charge if the Hygrade Company takes delivery of the livestock at the unloading pens (R. 37, 38). This requirement would argue no "reasonable opportunity" to take delivery, unless it be inferred that the length of time the animals stay in the unloading pens is such opportunity. As a result of the Commission's failure to make suitable findings, the matter of appellants' obligations under Section 15 (5) is left in doubt. Appellants cannot determine to what extent they are liable as common carriers; where the Commission's jurisdiction ends and that of the Secretary of Agriculture attaches, or to what extent, if any, they are or may be liable for the actions of the Yards Company.

It may be inferred that the Commission held it had jurisdiction to some extent over the yardage charges of the Yards Company, since it has made an order with respect to them. But nowhere in the report and order is there any finding to this effect, nor any language from which such a finding might be constructed. There is no statement or finding that the charges, the collection of which is prohibited by the order, are charges for a transportation serv-

ice performed by the Yards Company, appellants, or both of them, or that the service itself is a transportation service performed by the Yards Company as a common carrier. Also, there is no reference whatsoever to any jurisdiction over the yardage charges, which may be possessed by the Secretary of Agriculture under the Packers & Stockyards Act, 1921. The point is of some importance, for the Secretary now has under investigation the very yardage charges the collection of which has been prohibited by the Commission in the order here attacked (R. 152). If he has the jurisdiction which he is asserting and exercising, the Commission had no power to make the order which it did make.

In order that it might sustain the Commission's order, the lower court was compelled to assume that the Commission had definitely determined its jurisdiction over the yardage charges dealt with in its order, for the lower court said (R. 60, 61):

> "We think the Commission properly ruled that Section 15 (5) of the Act to Regulate Commerce did not limit its jurisdiction over terminals and terminal facilities of the line haul carriers and that its jurisdiction extended as provided for in paragraph 3, Section 1 of the Act."

It is certain that the Commission should have made a definite finding with respect to this point, but it is equally certain that it did not make the "ruling" attributed to it by the lower court, except in so far as it may be inferred from the order.

The complaint filed with the Commission (R. 18) alleged that the Yards Company was a common carrier engaged in the transportation of livestock subject to the Interstate Commerce Act. In its answer filed with the Commission (Part of Exhibit 1, certified to this Court), the Yards Company specifically denied that it was such a common carrier and denied that its activities or charges were

subject to regulation by the Commission. Thus, the legal status of the Yards Company was a matter definitely presented for consideration and determination. It may be inferred that the Commission thought the Yards Company was a common carrier subject to its jurisdiction, since the order is directed to the Yards Company, but there is no finding or discussion on the point in the Commission's report. Nor is there any finding as to the status of the Yards Company in relation to appellants, or any language referring to the matter.

This Court, under the circumstances then obtaining, held the Yards Company to be a common carrier in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286. The Commission reached the same conclusion in *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry.*, 52 I. C. C. 209, 58 I. C. C. 164. Since those decisions, the Yards Company has entirely divested itself of any interest, direct or indirect, in any railroad company, under authority of the Commission's decision in the *Chicago Junction Case*, 71 I. C. C. 631. It was, therefore, necessary for the Commission to re-examine the matter in view of the changed situation, since the facts now indicate that the Yards Company is not subject to the Commission's jurisdiction.

The only thing said in the report with respect to the status of the stockyard is that (R. 26):

> "The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line haul carriers bringing livestock to Chicago and they are the livestock terminal at Chicago for all these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make."

This statement referring to the facilities owned by the Yards Company is not a finding as to the legal status of the Yards Company itself in performing the services for which the prohibited yardage charges are collected. Even

the lower court agreed there was no finding on the point by the Commission (R. 58). The matter is of great practical importance, for the reason that the charges in question have been and are collected by the Yards Company under its tariffs filed with the Secretary of Agriculture (R. 152). Appellants have never collected them or received any part of them from the Yards Company.

Appellants are concededly common carriers subject to the Commission's jurisdiction. If the Yards Company, in collecting the charges dealt with in the Commission's order, is not a common carrier subject to the Commission's jurisdiction, the order should not have been directed to it. Nor could the order have been made against appellants in such case without a finding that the Yards Company is the agent of appellants, and certainly there is no such finding. As a matter of law, the order must be set aside if the Yards Company is not a common carrier, without regard to any other point. The same finding as to the agency of the Yards Company would be necessary, if appellants are to be bound by the order, even if the Yards Company is a common carrier. But if the Yards Company is a common carrier acting on its own behalf, the order should not have been directed to appellants at all, since they do not collect or receive the charges or have any control over them.

Recognizing the importance of the matter, the lower court dealt with it at some length, but did not make it any clearer. It said (R. 58):

> "The order is not indefinite in determining whether the Yards Company is a common carrier * * *. It was not essential to make such a finding here to support the order granted. The Commission found that the Yards Company was the livestock terminal for all the complaining carriers. The Yards Company provided for the carriers the means of making deliveries of livestock to the consignee at this public yard. But this delivery was a part of the transportation and of the duty of the carrier."

Again, the lower court said (R. 59):

> "The evidence is clear that these yardage charges are imposed, collected, and retained by the Yards Company and are for services rendered to the complainants in the performance of their transportation duties. It is proper that the order of the Commission should be directed against the Yards Company."

From the foregoing it might be concluded that the lower court thought appellants had the obligation of making the delivery to which reference is made, and that the order was properly directed to the Yards Company because it owned the facilities used by appellants in making such delivery. But the law is clear that the mere ownership of facilities which may be and are used in interstate transportation does not make the owner a common carrier subject to the Commission's jurisdiction. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 443, 444; *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, 295, 296; *Detroit, etc. Bridge Co.* v. *Corporation, etc. Board*, No. 272 October Term, 1934, decided January 14, 1935. Nor would the performance by the Yards Company of common carrier services for appellants as their agent subject it to the Commission's jurisdiction. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *A. T. & S. F. Ry.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 98; *Keystone Elevator & Warehouse Co.* v. *Director General*, 73 I. C. C. 273, 274.

The lower court also said (R. 59) that after the Yards Company was declared to be a common carrier in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286, it made changes in the terms of its leases, but that it was unnecessary to determine whether or not it changed its position as a common carrier, since in the performance of this duty it rendered transportation services. From this statement it might be concluded that the lower court thought the Yards Company performs the services in question as an independent common carrier; a holding at variance with that previously made.

Again, the lower court said (R. 59):

> "The Yards Company might well have been found to be a common carrier even though it be an agent of the complainants in their transportation service."

From this it might be concluded that the lower court thought the Yards Company was the agent of appellants in making the collection prohibited by the order, a holding still different from the two suggested by other parts of the lower court's opinion.

It is obvious that the lower court realized the insufficiencies of the Commission's report in so far as this matter is concerned, and endeavored to supply the findings which the Commission should have made. It had no authority to do so and did not, in fact, make the situation any better so far as appellants are concerned. Even the order made by the Commission affords no ground for any certain action.

The Commission's feeling that the Yards Company acted as a common carrier in its own behalf may be inferred from the fact that the order is directed to the Yards Company. But the order is also directed to appellants, which are also said to be liable for reparation, and this would argue some liability on appellants for what the Yards Company has done. In *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, 52 I. C. C. 209, 222, the Commission held that a determination of the common-carrier status of the Yards Company was necessary to a decision in the case. On rehearing of the same case, 58 I. C. C. 164, 167, it pointed out that because of the Yards Company's status as a common carrier its charges against the railroads would be subject to the Commission's approval. A determination of the issue was equally necessary in the case at bar.

The failure of the Commission to determine, through appropriate findings, the issues submitted to it, has resulted in a report and order so indefinite that appellants could not

know what to do in order to comply with the order. Appellants cannot definitely determine what their obligations are; when their duties as common carriers are discharged; at what point in the transportation of livestock to public stockyards the jurisdiction of the Commission ends and that of the Secretary of Agriculture attaches. They cannot know of what violation of law the Commission has found them guilty. The only definite finding and requirement is that the yardage charges may not be collected from the Hygrade Company in instances where delivery is taken at the unloading pens. This prohibition runs against appellants, with nothing to show why appellants should stop collecting charges which they never have collected and do not propose to collect.

While the Yards Company does collect the prohibited charges, their collection from the Hygrade Company is the only action prohibited. The Yards Company has no way of knowing whether or not it may continue the collection of its charges from appellants. To do so would require the assumption that the Yards Company was the agent of appellants or was renting to them facilities which they were required to furnish as common carriers, but was not acting as a common carrier in its own behalf in performing the service for which the charge is collected.

Nor can appellants determine their obligations. If they are to pay something to the Yards Company for the use of its facilities or for its services on the theory that under some circumstances they have an obligation beyond the unloading pen, it is necessary that they know the status of the Yards Company. If it is to be considered as an independent common carrier in furnishing such facilities and services, it must file its charges with the Commission, and appellants would then pay them through the filing of absorption tariffs with the Commission. That is what is done with the loading and unloading charges of the Yards

Company, and the Commission has declined to permit the Yards Company to cancel its tariff containing those charges. *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry., et al.*, 52 I. C. C. 209, 222, 223.

On the other hand, if the Yards Company is to be considered as not being an independent common carrier, any payment required to be made by appellants could be made under contract. The lower court suggested (R. 58) that the matter could be handled through a readjustment of divisions, assuming a finding by the Commission that the Yards Company was acting as a common carrier and entirely overlooking the conceded fact that appellants and the Yards Company do not join in the publication of joint rates.

The lower court also suggested (R. 58) that the matter of payments to be made by appellants for their use of the Yards Company facilities had been left by the Commission to the discretion of the carriers. The statement assumes such an obligation on appellants, and also overlooks the fact that the matter is not one which the law necessarily leaves to the discretion of the parties. As we pointed out, under circumstances which may perhaps obtain, the parties would have to handle any payment made by appellants in accordance with the requirements of the Interstate Commerce Act.

We submit that, for the reasons given, the order is void. The Commission has not only failed to state the grounds for its determination, *B. L. S. & W. R. Co.* v. *United States*, 282 U. S. 74, 86, but has failed to make those quasi-jurisdictional determinations which are essential to the validity of the order. The result is that appellants are left without those guides that they must have if they are to know what they should do in order to comply with the order. To put them in this position is neither fair nor just.

Conclusion.

We submit that in this case every consideration requires that the Commission's order should be set aside. By apparently concluding that appellants have some obligation beyond the unloading pens, in connection with the transportation of ordinary livestock in carloads to public stockyards, the Commission has misconceived the effect of statutory enactments, has given no effect to a practice which has established appellants' obligations, and has reached conclusions not supported by even its own decisions. It has apparently undertaken to establish a rule of law not justified by the statute upon which it apparently relies and certainly not supported by the only decision of this Court cited in the report. The order, if it becomes effective, will upset an orderly and efficient method of doing business which has grown up as a result of many years practice; will create doubt and uncertainty with respect to the obligations of appellants and the Yards Company; will impose upon appellants obligations far beyond their obligations as common carriers, and will confer upon the Hygrade Company and other consignees rights to which they are not entitled.

We submit that there is no justification for such a result. While the decision of the Commission, as such, is reflected in the majority report, it is nevertheless important that five Commissioners, only one less than the majority, vigorously dissented. It seems to us that the dissenting opinion correctly states the law.

In addition, the report of the Commission is so lacking in those findings which this Court has held to be necessary that in presenting our argument we have been compelled to assume the conclusions which the Commission may have reached as a foundation for its order. This is not in ac-

cordance with the law nor is it fair to appellants. The law requires that the Commission make those findings from which it may be known what it has done, and surely appellants are entitled to so much. The failure of the Commission in this respect has created an impossible situation so far as appellants and the Yards Company are concerned; as if compliance with the Commission's order be required, appellants do not know what action they should take.

We submit that the decree of the District Court should be reversed and that the order of the Commission should be set aside.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1934

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants

v.

THE UNITED STATES OF AMERICA, *et al.*
Appellees

No. 607

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,
Appellant

v.

THE UNITED STATES OF AMERICA, *et al.*
Appellees

BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

CHARLES E. COTTERILL
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TABLE OF CONTENTS

	PAGE
OUTLINE OF SITUATION AND THE DECISIONS OF THE COMMISSION AND THE COURT BELOW	2
(a) Essential Facts	2
(b) Proceedings Before the Commission	5
(c) Decision of the Court Below	11
SPECIFICATION OF ERRORS AND SUMMARY OF ARGUMENT	14
ARGUMENT	17
Part One	
I. The Union Stock Yard and Transit Company of Chicago is not a "common carrier engaged in the transportation of property wholly by railroad" within the provisions of the Interstate Commerce Act and therefore is not subject to the jurisdiction of the Commission	17
(a) Necessity for decision as to whether the Yard Company is a "common carrier by railroad"	18
(b) The situation when U. S. *v.* Union Stock Yards, 226 U. S. 286, was decided	20
(c) Subsequent change of situation	22
(d) Not being a "common carrier engaged in the transportation of property by railroad" the Yard Company is not subject to the Commission's jurisdiction merely because in limited degree the Yard Company "supplies to the railroads the means" by which the railroads effectuate terminal delivery and that such railroad delivery comes within the statutory definition of "transportation"	26

PAGE

(e) The "terminal" theory 27

(f) The "agency" theory 30

(g) Previous Commission attitude 31

II. The Yard Company was not properly made a party to the Commission's order whether or not the railroad companies are fulfilling their duties 33

Part Two

The invalidity of the Commission's order in its entirety 39

CONCLUSION 46

TABLE OF CASES CITED

Adams v. Mills, 286 U. S. 397 ..... 8, 9, 16, 27, 28, 30, 39

Allied Packers v. A. T. & S. F. Ry. Co., 161 I. C. C. 641 8

A. T. & S. F. Ry. Co. v. Kansas City Stock Yards Co., 33 I. C. C. 92 32

Central R. Co. of New Jersey v. U. S., 257 U. S. 247 33

Covington Stock Yards v. Keith, 139 U. S. 128 ..... 7, 14, 16, 36, 41, 44

Ellis v. I. C. C., 237 U. S. 434 28

Florida v. U. S., 282 U. S. 194 39

Gobel, Adolph v. B. & O. R. Co., 200 I. C. C. 606 8

In Re Chicago Junction Railroad, 71 I. C. C. 631; 264 U. S. 258; 150 I. C. C. 32 23

In Re Unloading of Livestock, 52 I. C. C. 209, decided Feb. 11, 1919 44

PAGE

Kahn's Sons Co. v. B. & O. R. Co., 192 I. C. C. 705 8

Missouri Pacific R. Co. v. Reynolds-Davis Grocery Co., 286 U. S. 366 33

Panama Refining Co. v. Ryan, — U. S. —, decided Jan. 7, 1935 39

Southwestern H. & M. Co. v. A. T. & S. F. Ry. Co., 129 I. C. C. 730 8

Spencer Kellogg v. U. S., 275 U. S. 566 30

Stafford v. Wallace, 258 U. S. 495 2

Strauss and Adler v. N. Y. C. R. Co., 153 I. C. C. 609 8

T. & P. R. Co. v. U. S., 289 U. S. 627 34

U. S. v. American Railway Express Co., 265 U. S. 425 24

U. S. v. B. & O., — U. S. —, decided Jan. 7, 1935 39

U. S. v. B. E. D. T., 249 U. S. 296 ..... 30, 31

U. S. v. Union Stock Yard, 226 U. S. 286 ..... 4, 10, 13, 17, 18, 20, 30

U. S. ex rel. v. C. N. Y. & B. R. Co., 265 U. S. 292 24

Wells Fargo & Co. v. Taylor, 264 U. S. 175 24

Wichita, etc. v. Public Utilities Commission, 260 U. S. 48 39

October Term, 1934, Nos. 606 and 607

IN THE

Supreme Court of the United States

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Appellants*, v. THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 606
THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, *Appellant*, v. THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 607

BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

These cases are before the Court on separate appeals from a decree of the United States District Court for the Southern District of New York (three judges sitting) in

which a suit to annul and enjoin enforcement of an order of the Interstate Commerce Commission was dismissed (R. 63, 70, 87, 91). The suit was instituted by twenty-four trunk line railroad companies (R. 3). The Union Stock Yard and Transit Company of Chicago became a party thereto upon application to the court (R. 47) which was granted (R. 48) as a matter of right inasmuch as such company had been a party defendant in the proceedings before the Commission (Sec. 208 Judicial Code).

After dismissal the District Court granted a stay of the Commission's order for thirty days (R. 66, 70) in the course of which a new stay was granted by a Justice of this Court to hold good until disposition of these appeals (R. 79).

Outline of Situation and the Decisions of the Commission and the Court Below

There will shortly be described the proceedings before the Commission, the decision of the court below and the principal questions before this Court. First a few facts are stated so that the situation out of which the controversy arises may be clarified.

(a) Essential Facts

The Union Stock Yard and Transit Company of Chicago (hereinafter called the Yard Company) is a public stockyard subject to the jurisdiction of the United States Secretary of Agriculture (*Stafford* v. *Wallace*, 258 U. S. 495). At the edge of the Yards are numerous so-called "unloading pens" into which livestock is at first put when unloaded from railroad freight cars. Generally the live-

stock is then taken immediately from the unloading pens to "holding pens" inside the Yards. The duration of the stay in holding pens is variable depending upon disposition of the animals.

A number of large packing companies have their plants outside the Yards and remove their livestock from the holding pens through the Yard properties to such plants. The Hygrade Food Products Corporation is one of them, and it is also served directly by one of the trunk line railroads.

Sometimes the Hygrade Company takes its livestock direct from the unloading pens when its employees are there before removal into the holding pens. In taking livestock direct from the unloading pens the Hygrade Company likewise drives it through the extensive Yard properties onto and over a viaduct runway owned by the Yard Company and leading into the packing plant outside.

Neither the Hygrade Company nor any other concern has a right to enter the Yard properties or to use such properties for their incoming or outbound shipments except upon compliance with the rules and regulations and upon payment of "yardage" charges of the Yard Company which are imposed against consignees for use of the yard facilities respecting livestock whether taken from unloading or from holding pens. Imposition of yardage charges by the Yard Company under both circumstances has been a continuous practice for more than sixty-five years. Such charges and the regulations surrounding their imposition are now covered by tariffs lawfully on file with the United States Secretary of Agriculture as required by the "Packers and Stockyards Act" of Congress (Ex. 23).

While owning several hundred miles of railway track-

age outside the Yard properties neither the Yard Company nor any concern with which it is affiliated directly or indirectly operates any railroad. The rail facilities so owned by the Yard Company are leased and operated by the New York Central Railway through a subsidiary. That railroad, in turn, has granted to other trunk line railroads the privilege of coming over its line to the Yard properties under a conventional arrangement between them with which the Yard Company has no direct relation. That important change occurred with the approval of the Commission long after this Court's decision in *U. S.* v. *Union Stock Yards*, 226 U. S. 286 (*R.* 147 *et seq.*).

For a small amount of compensation which it receives from the trunk line railroads the Yard Company unloads the livestock from the railroad cars into the unloading pens and it likewise does for them some clerical work such as collection of railroad charges and handling of the freight billing. In that sense and to such extent the railroad companies utilize the properties and services of the Yard Company as their "terminal." It is there and in that way that most of the Chicago livestock is handled.

Railroad willingness to deliver livestock at this public stockyards has never been unconditioned. They have never obligated themselves to shippers and receivers in such way as to put upon the railroads the expense of providing the public yards. The whole limit of railroad obligation to deliver at the Yards at all has been restricted to the placement of the livestock into the unloading pens. The tariffs on file with the Commission in effect so declare (R. 178, 179).

The railway companies are also obligated under their tariffs to make direct delivery of loaded cars of livestock

at the plant of the Hygrade Company outside the Yards and have other places of their own on their rails in Chicago at which they provide loading and unloading facilities and where no yardage charges are imposed. The Hygrade Company would be required to pay railroad switching charges for direct delivery of loaded cars at its plant and it deems such transportation costs higher than it can afford to pay. Its packing plant is located quite far away from the individual railroad-owned livestock unloading facilities at different places in Chicago and it deems the use of such railway facilities inconvenient (R. 121, 122). Therefore the Hygrade Company prefers to use the facilities of the Union Stock Yard in having shipments of livestock transported to it at that place and adjacent to which its plant has been located.

(b) Proceedings Before the Commission

The involved order of the Commission was entered in July, 1934, as the consequence of a formal complaint proceeding instituted by the Hygrade Food Products Corporation and reported in 195 I. C. C. 553 (R. 24, 37).

In such proceedings before the Commission the Hygrade Company first contended that the charges imposed by trunk line railroads for switching loaded cars of live stock directly to the plant of the Hygrade Company were inapplicable, unreasonable and discriminatory. As to such part of the complaint the holding of the Commission was that the lawfully applicable railroad rates for such switching of carloads to and delivering them immediately at the plant of the Hygrade Company were neither unreasonable nor discriminatory.

Another contention of the Hygrade Company before the Commission was in regard to the "yardage charges" imposed by the Yard Company on all live stock received by the Hygrade Company at such public stockyards from railroads making deliveries thereat upon the request of the Hygrade Company and taken by the Hygrade Company through the properties and by means of the special facilities of the Yard into the packing plant of the Hygrade Company located outside. Such complaint was directed to imposition of the yardage charges whenever imposed whether in instances of removal from "unloading pens" to the "holding pens" and thence to the packing plant or in instances when taken directly from the "unloading pens" through the Yard properties over the viaduct into the packing plant located outside.

The Commission stated that issue before it in the following terms:

> "Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon Section 15, Paragraph (5), of the Act, which provides that * * *."

The holding of the Commission was that such imposition of "yardage charges" was not unlawful when the live stock was taken by the consignee from "holding pens"; but when delivery is taken at the unloading pens it is not "subject" to yardage charges. The language of the Commission was as follows:

> "We further find that livestock in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

The affirmative order of the Commission required cessation of the charge for yardage for such use of the yard properties and facilities by the Hygrade Company when the latter takes its livestock out of "unloading pens" into its packing plant.

Both the trunk line railroad defendants and the Yard Company were made responsive to the Commission's order to cease and desist. It is the validity of that report and order of the Commission which is involved in this litigation.

The Commission seemingly dealt with such question of the yardage charge as if one of law. It deemed the placement of livestock into "holding pens" and removal therefrom "not necessary" to effectuate delivery and that therefore an extra yardage charge may be imposed by the Yard Company in that event. But in instances when the Hygrade Company takes its livestock directly from the unloading pens over and through the Yard properties and the viaduct into its packing plant outside, the Commission considered the imposition of a yardage charge by the Yard Company to be "unlawful." Just what provision of the Interstate Commerce Act is thought by the Commission majority to be violated is not determinable from the report. The "order" subsequently entered speaks of the "unlawful practice" of assessing this yardage charge but does not reveal what part of the statute is thought applicable. Counsel for the Government, in seeking to defend the order, point to the decisions of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, and *Adams* v. *Mills*, 286 U. S. 397, together with the provisions of Section 15(5) of the Interstate Commerce Act.

There are no findings, basic or otherwise, which illuminate the Commission's intent.

In the case of *Adams* v. *Mills*, this Court dealt with the situation at Chicago prior to enactment of Section 15(5). It there upheld an express finding by the Commission that under the particular facts at Chicago which the Commission described it was "unreasonable" for the railroads not to bear the whole expense of *unloading* the livestock into unloading pens. The decision of the Commission in the present case is that it is "unlawful" for the shippers to be required to pay a "yardage" charge for the use of the public stockyard facilities *after* unloading of the livestock into unloading pens.

The report of the Commission in these proceedings discloses close division of thought on the question of law involved. Five of the eleven members voted for complete dismissal on the ground of lack of jurisdiction. Of the six who voted for the affirmative order one concurred specially on grounds differing from those of the other five making up the majority.

This close division on the law applicable in such cases came after decisions in other and earlier cases since 1920 exhibiting both disagreement and a shifting of majority view.

Southwestern H. & M. Co. v. *A. T. & S. F. Ry. Co.*, 129 I. C. C. 730;

Strauss and Adler v. *N. Y. C. R. Co.*, 153 I. C. C. 609;

Allied Packers v. *A. T. & S. F. Ry. Co.*, 161 I. C. C. 641;

Kahn's Sons Co. v. *B. & O. R. Co.*, 192 I. C. C. 705;

Gobel, Adolph v. *B. & O. R. Co.*, 200 I. C. C. 606.

As stated there was no finding of "unreasonableness" here in terms as there had been in the case reviewed by this Court in *Adams* v. *Mills*. Instead the Commission majority stated that:

> "Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon Section 15(5) of the Act."

Addressing itself to that issue, the considerations which apparently controlled the Commission were stated by it as follows:

> "The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make."
>
> • • • • • • •
>
> "Under this provision of the Act (Sec. 15(5)) which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge *for the mere placement* therein of the livestock. The fact that the line haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards." (Covington Stock Yards *v.* Keith, 139 U. S. 128, then cited and quoted from. (Italics supplied.)
>
> • • • • • • •

"It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens."

* * * * * * *

"We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

While the yardage charge found unlawful is imposed, collected and retained solely by this public Yard Company for its own account the majority view of the Commission undoubtedly was that the *railroad* companies owe to consignees the duty of enabling them to take their livestock out of unloading pens in this public stock yards through the yard properties into their packing plant outside without payment of the yardage or any other charge. Viewing the yard properties as constituting in law a "terminal" of the trunk line railroads the thought of the Commission evidently was that it is incumbent upon the railroad companies to do at this public yard what would be required of railroads at yards of their own and to engage and compensate the Yard Company for so allowing consignees to come upon and use the Yard properties for removal of livestock from unloading pens into the packing plants which are beyond the boundaries of the Yard area.

The Commission did not discuss the status of the Yard Company as a proper defendant before it in the case. It did not respond in terms to the insistence of the Yard Company that the Commission lacked jurisdiction (R. Ex. 1) as to it because, subsequently to the decision of this Court in *U. S.* v. *Union Stock Yard*, 226 U. S. 286, it had, with the sanction of the Commission, ceased to be a "common carrier engaged in the transportation of property by railroad."

(c) Decision of the Court Below

The real question here is the validity of the Commission's order. But as this is an appeal from the District Court's decision it is appropriate to state what was its view of the case.

Early in its decision the court first declared the holdings of the Commission were that the yardage charge was imposed for the "mere placement" of livestock into the "unloading pens," that this constituted "no assessable service rendered by the Yard Company," and that such "practice" was determined by the Commission unlawful *under Section 15(5) of the Act.*

The language of the court at that place in its opinion was as follows:

> "The Interstate Commerce Commission found the Yards Company to be a livestock terminal for the line haul carriers bringing livestock to Chicago, and that consignees were entitled under Par. 15(5) of the Interstate Commerce Act (41 Stat. 456, 484, U. S. C. Title 49) to delivery at pens, suitable for proper delivery, without charge, and that the mere placement therein of livestock constituted no assessable service rendered by the Yards Company."

Thus at that place in its opinion the Court construed the action of the Commission to have been grounded upon the requirements of Section 15(5) of the Act which defines railroad duties in the delivery of livestock at public yards. But thereafter in its opinion the Court departed from its construction of the Commission's holding and dealt with the matter as if one in which the Commission had held Section 15(5) *not* to be controlling or a limitation upon its authority to find "unreasonable" railroad practices affecting delivery charges under Sections 1(3)(6), 13(1)

and 15(1). This entirely different conception of what the Commission had decided is revealed in various parts of the Court's opinion and particularly so in the concluding language of the Court as follows:

> "We think the Commission properly ruled that Section 15(5) of the Act to regulate commerce did not limit its jurisdiction over terminals and terminal facilities of the line-haul carriers, and that its jurisdiction extended as provided for in Para. 3, Sec. 1 of the Act."

The Court's own view was that while Section 15(5) declares what the railroad duty shall "include" when delivering livestock at public terminals the Congressional intent was to leave the Commission free to impose upon railroads even greater duties when found "reasonable" under Sections 1 and 15 of the statute. The Court did not say, however, that any such conclusion of "unreasonableness" had been declared by the Commission.

Moreover, the Court did not inquire whether the Commission was right in attributing the yardage charges to the "mere placement" of livestock "into unloading pens," or whether as *conclusively* shown by the record before the Commission, such charge was imposed by this public stockyards for the use of its properties and facilities in removing the livestock out of the unloading pens into the plant of the Hygrade Company contiguous to the Yards. And in respect to the view of the Court that the Commission possessed the authority to prescribe a "reasonable" practice under Sections 1 and 15 of the Act (independently of Sec. 15(5)) the Court did not point to any "findings" of the Commission as to "unreasonableness" nor did it describe any evidence before the Commission which would have sufficed to support any such findings had they been made.

As to the contention of the Yard Company that it is not subject to the jurisdiction of the Commission, the Court held it to be "not essential" to decide whether the Yard Company afterwards ceased to be and is not now a "common carrier engaged in the transportation of property by railroad" although it formerly was such when so held by this Court years ago in *U. S.* v. *Union Stock Yards*, 226 U. S. 286. As to that important question the court below considered the Yard Company properly subject to the Commission's order for the reason that it "supplies to the railroads the means by which" the railroads undertake to effectuate delivery of livestock at the public yards in Chicago.

The court below further held that the *trunk line railroads* are under the duty of compensating the Yard Company for all the yard properties and facilities which the railroads do or should use in discharging their full duty to consignees, and that should disagreement hereafter arise concerning what the amount of such compensation should be the proper remedy would be for the parties to have recourse before the Commission under Section 15(6) to fix "divisions" of "joint through rates." While thus declaring the *railroad* duty to consignees embraces provision for free use of the public stock yards in removing livestock from unloading pens and that the railroads should compensate the Yard Company for such added shipper use of its properties and facilities, the court nevertheless held the Yard Company responsible under the Interstate Commerce Act, along with the trunk line railroads, for such failure of the trunk line railroads to do what the court says the *railroads* are required under the law to do.

Specification of Errors and Summary of Argument

Now that the case is before this Court it is apparent that the important questions of error to be decided are:

1. Is the Yard Company subject to the jurisdiction of the Commission?

2. Whether subject to such jurisdiction or not, did the Commission lawfully direct its order to the Yard Company as well as to the trunk line railroads?

3. Is Section 15(5) a complete declaration of railroad duty in delivering livestock at public stockyards under the circumstances of this case and does the Congressional statement of what such duties "include" mark the whole limit of railroad obligation; or would it be competent for the Commission to consider that because the railroads are willing to deliver the livestock of consignees at this public stockyards they have in that way and to such extent made of the Yards "their terminal" carrying with it the same obligation of providing "free passage" into and out of the Yards as would be the railroad duty at the individual yards of their own which this Court described in *Covington Stock Yards* v. *Keith*, 139 U. S. 128.

4. If Section 15(5) were not controlling did the Commission hold as a matter of law that the yardage charge here involved is "unlawful" and, if so, did it err?

5. If the Commission's decision did not rest upon a conclusion of law was its conclusion "administrative," in the nature of a determination of "unreasonableness" of a railroad practice, in which event are there any "basic findings" sufficient to support such a conclusion?

6. Would the Commission have been warranted by any evidence before it in a conclusion of "unreasonableness"?

The Yard's position on these controlling questions is:

1. The Commission lacked jurisdiction over the Yards because, ten years ago, it sanctioned changes in the Yards' activities and relations with railroads that caused the Yards no longer to be a "common carrier engaged in the transportation of property by railroad."

2. Even if it were subject to Commission jurisdiction the Yard Company is not at fault in this matter whatever may or may not be the obligations of railroads to shippers and consignees at that place. The Yard Company has not been employed by the railroads to do for them more than to unload the livestock into unloading pens and to perform certain clerical services. It has no control over the railroads. It is not party to any through rates capable of "division" under Section 15(6) of the statute. If it were to be the law that railroads should provide consignees with "free passage" into and out of this public stockyards the refusal of the railroads to do so is not something for which an order of the Commission may be directed against the Yard Company.

The foregoing propositions are in the main distinctive to the Yard Company and, if sustained, would nullify the Commission's order as to it.

The Yard Company also joins with the railroad appellants in the respectful insistence that in its entirety the order of the Commission should be annulled and its enforcement enjoined for these reasons:

3. In the enactment of Section 15(5), and soon thereafter the Packers and Stockyards Act, the full Congressional intent is revealed. The force of those two statutes combined causes railroad duty to end with the delivery and unloading of livestock "into suitable pens" "at" public stockyards. The use of other properties of the Yard Company by consignees and shippers in having railroads transport the livestock to this public stockyards and in the removal of it therefrom by means of the Yard facilities and properties is a "public stockyard" activity for which consignees and shippers must separately pay the Yard Company under tariff charges filed with the United States Secretary of Agriculture who alone has jurisdiction.

5. The Commission put its decision upon conclusions of law and did not truly seek to exercise any supposed authority to make independent "findings" of "unreasonableness" of railroad practices even if such separate authority existed. But in any event this assessment of "yardage charges" has been continuous for sixty-five (65) years and the railroads have never engaged themselves to do more at the Union Stock Yards in Chicago than to unload the livestock into unloading pens. This is not inherently unlawful under Section 15(5) or any other particular provision of the Act; it is not inherently unlawful under the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128; no conclusion of "unreasonableness" is supportable by any facts shown of record before the Commission such as prevailed in *Adams* v. *Mills*, 286 U. S. 397; nor did the Commission make any "basic findings" requisite to sustain a conclusion of unreasonableness had such a conclusion been intended.

ARGUMENT

PART ONE

I

The Union Stock Yard and Transit Company of Chicago is not a "common carrier engaged in the transportation of property wholly by railroad" within the provisions of the Interstate Commerce Act and therefore is not subject to the jurisdiction of the Commission.

At one time the Yard Company was a "common carrier engaged in transportation by railroad" and held to be such by this Court in *U. S.* v. *Union Stock Yards*, 226 U. S. 286. Long afterwards, with the sanction of the Commission, the Yard Company changed so fundamentally its activities and its relations with railroads that now it is believed no longer to be subject to civil orders of the Commission. Before the Commission the Yard Company denied jurisdiction both in its pleadings and in the evidence. The report of the Commission makes no findings as to the change of facts and denied rehearing without assignment of reasons. This lack of findings as to facts upon which the jurisdiction of the Commission depends should invalidate the order. It puts upon this Court the burden of ascertaining the facts from the lengthy record. They are in substance as follows (R. 148 *et seq.*).

Neither the Yard Company nor any holding company now operates any railroad or "hauls" or "engages in the

transportation" of any property by railroad. Neither it nor any holding company has any interest, direct or indirect, in any other company which operates a railroad or hauls or transports property to and from the Yard. While owning extensive railroad trackage and some equipment outside the Yards such properties were leased ten years ago to a subsidiary of the New York Central Railway with which the Yard Company is wholly dissociated. Since then the railway properties have been operated by the New York Central subsidiary and it, in turn, accords to other trunk line railroads the privilege of running their trains over the trackage to and from the Yards. The New York Central pays a fixed annual rental for its use of the railway properties. The Yard Company is now solely a "public stockyards" as defined in the "Packers and Stockyard Act" and is subject as such to the jurisdiction of the United States Secretary of Agriculture.

Adequate consideration of this important change of activity requires comparison of the particulars of the situation today and as they existed some years ago.

Before undertaking a comparison and analysis of this Court's previous decision in *U. S.* v. *Union Stock Yards*, 226 U. S. 286, attention is called to what is submitted to be an erroneous view of the court below that it is "not necessary" to decide this question of common carrier status.

(a) Necessity for Decision as to Whether the Yard Company Is a "Common Carrier by Railroad"

The whole of the Commission's jurisdiction to make orders of any kind against any party before it is derived from Section 1(1) of the Act. The part thereof which is material here is the following:

> "Sec. 1(1) That the provisions of this Act shall apply to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad • • •."

Thereafter, throughout all the provisions of the statute, each command and prohibition is directed to "common carriers subject to the provisions of this Act."

It must follow that whether or not the Yard Company is subject to the jurisdiction of the Interstate Commerce Commission depends *solely* upon the question whether it *is* a "common carrier engaged in the transportation of property wholly by railroad." The court below declared that it was "not essential" to make a decision as to such matter. Seemingly the view of the court below was that whether the Yard Company be a common carrier by railroad or not:

> "The Commission found that the Yard Company was the livestock terminal for all complaining carriers. The Yards Company provided for the carriers the means of making deliveries of livestock to the consignees at this public yards. But the delivery was a part of the transportation and of the duty of the carrier. Covington Stock Yards *v.* Keith, 139 U. S. 128; Adams *v.* Mills, 286 U. S. 397."

Evidently it was the thought of the court below that a concern may be subject to the jurisdiction of the Commission even though it be *not* a "common carrier by railroad" within the provisions of the Act if it "supplies" to railroads the "means" by which the *railroads* discharge railroad "transportation" duties to the public.

No matter what a concern may do it is not subject to the jurisdiction of the Commission if the things which it

does do not constitute "common carriage by railroad" within the provisions of the Act. The things which it does may have a bearing upon the determination of its status and they need to be examined from that standpoint. However, there is no escape from the duty of deciding whether or not the things which it does constitute it a "common carrier of property by railroad." Therefore the court below erred in assuming that the jurisdiction of the Commission attaches to any sort of concern or its activities not coming within that category.

(b) The Situation When *U. S.* v. *Union Stock Yards*, 226 U. S. 286, Was Decided

When the Union Stock Yards was first established it was authorized so to do and did in fact construct many miles of railroad trackage from its properties and leading out to points of connection with trunk line railroads. Years afterwards the Yard Company leased all such railway facilities to the "Chicago Junction Railway." Both that railway company and the Yard Company were almost completely owned by a single holding company and such was the situation before this Court in 226 U. S. 286.

At that time the Chicago Junction Railway was a full-fledged operating common carrier of property by railroad. With its own locomotives and crews it was then engaged in "hauling" various kinds of property into and out of the stockyards district under joint through interstate freight rates. It *physically transported* such property for long distances between points of connection with trunk line railroads and shippers and consignees within and outside the yard area *using its own locomotives, crews, and other railway facilities.* Contemporaneously the Chicago Junction

Railway extended to the trunk line railroads the privilege of operating their own trains over the rails of the Chicago Junction for the purpose of receiving and delivering livestock at the stockyards. That was in the nature of a "trackage" agreement. Upon arrival of the loaded livestock cars at convenient places at the edge of the Yards the Yard Company emptied the contents into unloading pens nearby which the cars had come to rest. Additionally the Yard Company collected for account of the railroads their freight transportation charges and performed other clerical services incident thereto.

In the light of those facts this Court was required to consider whether or not both the Union Stock Yards and the Chicago Junction Railway constituted "common carriers by railroad" within the Interstate Commerce Act. As to the Chicago Junction the affirmative holding did not require or receive much discussion. But the Yard Company was likewise held to be such a "common carrier by railroad."

The reasoning of this Court reveals the basis for such decision. The separate corporate identities of the Yard Company and the Chicago Junction Railway were treated as non-existant because of the complete control of both by a single holding company.

Considering the two concerns as but one the court concluded that such single concern was engaged in the physical haulage and delivery of property both at and outside the yards in continuous through movements in interstate commerce over its own rails, with its own equipment, and under joint through rates with connecting trunk line railroads. The Yard then shared the earnings of the railway on a percentage basis. Continuing to view the two concerns as if one the court noted the trackage

arrangement with trunk line railroads by which the trains of the latter came to and from the Yard properties under the "trackage" plan which carried with it unloading of the cars by the Yard Company for account of the trunk lines. The controlling, outstanding fact which then existed was the actual *haulage* of freight property by the Chicago Junction Railway in its own name and behalf and its trackage arrangement with trunk line railroads referred to. As the Chicago Junction Railway was in every respect a full-fledged operating railroad common carrier and as it and the Yard Company constituted in law a single concern both physically transporting and making receipt and delivery of property the holding of this Court and the reasons for it are clear.

There was no holding that the Yard Company was or could be a common carrier by railroad *standing alone* and independently of its operation of the railroad properties through the Chicago Junction as a transporting carrier. The mere *ownership* of the railway facilities and the performance of unloading of livestock and certain clerical services in behalf of the trunk line railroads did not cause this Court to declare the Yard Company then to be a common carrier by railroad. The decision in that case has never since been cited by any court in support of the view that a public stockyards is made subject to the Interstate Commerce Act when it does not transport property but merely makes certain of its unloading facilities available to trunk line railroads in order that the latter may serve the Yards.

(c) Subsequent Change of Situation

Years after the decision mentioned there occurred a fundamental change in the situation just described. With

the sanction of the Commission (*In Re Chicago Junction Railroad*, 71 I. C. C. 631; 264 U. S. 258; 150 I. C. C. 32) a wholly owned subsidiary of the New York Central Railway leased all the properties of the Chicago Junction and the exclusive privilege of operating such railroad for a long term of years upon the basis of a fixed annual rental. The New York Central thereupon extended to other trunk line railroads trackage rights to and from the Yards. From that time onward the Chicago Junction Railway ceased to be "engaged in the transportation of property by railroad." While retaining its corporate existence it divested itself of all the functions of an operating common carrier entitled as such to deal with shippers and other carriers. It ceased to "haul" or otherwise "transport" property of any kind for any distance. It became as a consequence the mere possessor of a lease of the railway properties from the Union Stock Yard which lease it had, in legal purpose and effect, assigned over to the New York Central Railway. In substance the Union Stock Yard had directly leased the railway properties and the privilege of their operation to the New York Central for a long term of years.

As neither the Chicago Junction nor the Union Stock Yard in fact now operates any railroad or hauls or transports any property whatsoever there is no foundation for the proposition that the Union Stock Yards is a "common carrier engaged in the transportation of property wholly by railroad." To be subject to the jurisdiction of the Commission nothing else may suffice. The essential condition precedent to the Commission's jurisdiction is that a concern must actually be a "common carrier" which by its own meaning connotes some sort of institution which "carries" for the public from one place

to another. Mere charter power to be such a "common carrier" alone does not govern. Paragraph 1(a) of Section 1 continues on to provide that for a common carrier to be subject to the Act it must also be "engaged in the transportation of property." By those words Congress limited the scope of the Act in its application to particular concerns. The intent was to reach only those common carriers which are actually functioning as such in relations to the shipping public as transporters and haulers of goods. It was further made requisite that such concerns be those which "transport" property "wholly by railroad" or, under certain circumstances, partly by railroad and partly by water.

In declaring what constitutes a "common carrier by railroad" this court in *Wells Fargo & Co.* v. *Taylor*, 264 U. S. 175, said:

> "It is • • • one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier."

The holding in such case was affirmed in *U. S. ex rel.* v. *C. N. Y. & B. R. Co.*, 265 U. S. 292, and it was there stated that the definition in the *Taylor* case

> "—was not made to rest upon any peculiarity in the Act in review, but was said to be in accord with the ordinary acceptation of the words • • •."

In *U. S.* v. *American Railway Express Co.*, 265 U. S. 425, this Court further said:

> "The natural meaning of the term 'carrier by railroad' is one who operates a railroad • • •."

The scheme of the Act is plain in its intended application. It is designed to reach only those railroads which are "engaged in transporting" property in interstate commerce, and only those railroads operating as such and transporting property in interstate commerce as "common carriers."

The limitations in Section 1(1) of the original Act of 1887 (still in force) were so apparent that in order to reach certain other kinds of companies Congress in Paragraph 3 of Section 1 afterwards defined the term "common carrier" so that it would include by name pipe line companies, telegraph, telephone, and cable companies, express companies and sleeping car companies and "all persons natural or artificial engaged in such transportation or transmission as aforesaid as common carriers for hire" (Sec. 1, par. 3).

In further recognition of its intended restriction upon the general scope of the Act, Congress, in express terms, made a significant exception in Paragraph 1 of Section 20 dealing with annual reports. In the first sentence thereof it required such annual reports from all common carriers subject to the provisions of the Act and then added "and from the owners of all railroads engaged in interstate commerce as defined in this Act." Thereby, in respect to the particular matter of annual reports, Congress required that the "owners" of all railroads subject to the Act should make annual reports as well as "common carriers subject to the provisions of this Act."

(d) Not being a "common carrier engaged in the transportation of property by railroad" the Yard Company is not subject to the Commission's jurisdiction merely because in limited degree the Yard Company "supplies to the railroads the means" by which the railroads effectuate terminal delivery and that such railroad delivery comes within the statutory definition of "transportation."

The court below did not hold that the things which the Yard Company does cause it to be a "common carrier engaged in the transportation of property by railroad." It considered decision of such question "not essential." The view of the court was that the jurisdiction of the Commission extended to the Yard Company because it "supplies to the railroads the means" by which the railroads accomplish "terminal" delivery of livestock within the yards and because such *railroad* delivery by those "means" comes within the statutory definition of "transportation."

It is submitted that the court below erred, and, that unless the things which a company does are such as cause it to be a "common carrier in the transportation of property by railroad," it is not subject to the general jurisdiction of the Commission.

While the court below did not do so, it nevertheless is to be considered whether the things which the Yard Company does are of such character that it is or is not made thereby a "common carrier by railroad."

It has been shown above that no longer does the Yard Company itself or any concern with which it is affiliated "haul" or "transport" property by railroad. All interest in railroad operation has been divested and conveyed to a trunk line railroad company—the New York Central.

While the trackage is still owned by the Yard Company the New York Central has leased it at a fixed rental and extended to other trunk line railroads the right to come over it. In that way all the trunk line railroads bring livestock to the yard properties by means of their own trains and crews. The Yard Company, under agreements with such trunk line railroads, performs for a consideration only the manual labor of unloading the livestock out of the cars into contiguous "unloading pens" owned by the Yards. The freight charges of the railroads are collected from shippers and consignees by the Yard Company as employed agent for the railroads and certain clerical work incident to handling of the billing is similarly performed and paid for by the railroads.

It is because of such facts that the court below declared the Yard Company "is a terminal of the railroads" and supplies to the railroads the means "by which the railroads perform their duties to shippers in delivering livestock." Such "delivery" when done by railroads is made by statute an act of "transportation" by the railroad companies in Paragraphs 3 and 4 of Section 1 of the Act. Those facts do not however make the Yard Company subject to the jurisdiction of the Commission as a "common carrier by railroad."

(e) The "Terminal" Theory

Much is made of the statement by this Court in *Adams* v. *Mills*, 286 U. S. 397—

> "That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so."

Substantially the same thought appears in the majority opinion in the present case. If to the limited extent apparent certain of the yard facilities are so necessarily *used* by railroads that the railroads have in *part* adopted the yards as their own terminal, that fact would not lead to the conclusion that the Yard Company, whose properties are used by the railroads, is *itself* a "common carrier engaged in the transportation of property by railroad."

The expression by this Court in *Adams* v. *Mills*, was not used in connection with any controversy then before the court touching the question whether or not the Yard Company was a "common carrier by railroad." At the time dealt with in *Adams* v. *Mills* the Yard Company undoubtedly was a common carrier. It had been held to be such in the Commission proceedings then under review, and before this Court the Yard Company was then insisting that because of such determination of its common carrier status certain conclusions on the merits of that case should follow.

Whether or not this Court would now repeat the conclusion that to a limited extent the Yard properties are used by trunk line railroads as their "terminals" both in getting to the Yards and effectuating delivery into unloading pens it does not follow that such "terminal" use of the Yard properties by railroad companies makes the *Yard* Company a transporter of freight in the capacity of common carrier by railroad.

This ground has been thoroughly covered in principle in *Ellis* v. *I. C. C.*, 237 U. S. 434. It there was held that those who own and supply to railroad companies facilities which the latter use in the performance of their own

transportation duties to the public are not, by that fact alone, made common carriers by railroad "contrary to the truth." The argument then before this Court was that concerns of such character own and supply facilities of "transportation" as defined by Congress in Paragraph 3 of Section 1 of the Act. (The same contention was made in the present case to the court below.) In reply to that argument this Court in the *Ellis* case pointed out that the statutory definition of "transportation" in Paragraph 3 of Section 1 did not make common carriers by railroad out of those which otherwise are not such. Such definition, the court held, was *merely preliminary* to the subsequent requirement of *Paragraph 4* of Section 1 that the facilities of "transportation," as so defined, should be "furnished" by those who *are* common carriers "subject to the Act." The language of this Court on that point was:

> "The definition is a preliminary to a requirement that the carriers shall furnish them (the facilities described) upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth."

So here: were it to be granted that the term "transportation" as used in the Act embraces the railroad unloading of livestock into unloading pens (which the Yard Company performs as railroad "agent" under contract) and while the Yard Company owns the railway tracks upon which the New York Central runs its trains to the yard and that carrier extends to other trunk lines a like privilege, the Yard Company is the mere "owner" of certain property "used" by railroad companies and

performs only certain labor and clerical activities for such railroad companies merely as their "agent."

Such facts do not make the Yard Company subject to the jurisdiction of the Commission.

In further support of the position here taken attention is called to Section 15(13) of the Act. Congress there provided that railroads may make "allowances" to *shippers* whenever the latter perform for railroad companies any services of "transportation." There was no intent to make *shippers* common carriers by railroad subject to the Act under such circumstances.

(f) The "Agency" Theory

Only in connection with criminal provisions of the Act are "agents" of railroads directly regulated when not themselves common carriers. (See Sec. 10 of I. C. Act and Elkins Act.) Concrete application of the provisions directed to "agents" and the reason for such extension of the criminal law appear in *Spencer Kellogg* v. *U. S.*, 275 U. S. 566, affirming the comprehensive decisions of the courts below.

More than once this Court has declared that when a concern which in fact and in law is a "common carrier by railroad" happens to perform activities in behalf of other railroad companies as the agent of the latter the fact of such "agency" does not *relieve* such concern from its responsibilities as an operating "common carrier by railroad." It has never held that mere "agency" for a railroad alone makes the agent a common carrier if not otherwise such. *U. S.* v. *B. E. D. T.*, 249 U. S. 296; *Adams* v. *Mills*, 286 U. S. 397; *U. S.* v. *Union Stock Yards*, 226 U. S. 286.

In each of those cases the party before this Court was determined then to be engaging in the *haulage* of property by railroad in interstate commerce and functioning in all respects as "common carriers." Thus in the case of *U. S.* v. *B. E. D. T.*, 249 U. S. 296, this Court held the Brooklyn Eastern District Terminal to be a "common carrier by railroad" because in that instance the terminal company received carload and less-than-carload freight from trunk line railroads on the New Jersey side of New York Harbor—

> "and transports the same from their termini to its Brooklyn docks. And the cars containing such freight are hauled from the carfloats by its locomotives and placed for unloading either on its team tracks or at its freight houses."

Escape from legal restrictions there was sought on the ground that the things being done were for the account of some one or more other railroads in the capacity of "agent." The holding of this Court was, however, that a concern which in point of fact and law is a common carrier by railroad and so functions does not cease to be such because the activities are as "agent" and in behalf of other railroad common carriers.

But neither in the foregoing nor in any other case has it ever been held by this Court that the mere relation of "agency" could make into a "common carrier by railroad" a concern which otherwise is not such.

(g) Previous Commission Attitude

The decision of the Commission in the present case is wholly inconsistent with what it decided under analogous

circumstances in *A. T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Company*, 33 I. C. C. 92. There the Commission had before it a public stockyard company which owned but did not "operate" the railroad tracks within and leading into its properties. The Stock Yard Company permitted trunk line railroad companies to operate over its trackage with their trains and crews, paying to the Yard Company compensation therefor. In addition, the Yard Company at Kansas City unloaded the livestock for the railroad companies. The decision of the Commission was that the Stock Yard Company, while entitled to receive compensation from the railroad companies, was not in fact or in law a "common carrier by railroad" subject to the Commission's jurisdiction.

It is submitted that the decision of the Commission in the *Kansas City* case was correct and should have been followed here. While the Chicago Union Stock Yard is, to a limited extent, an "agent" or employee of the railroads and it is the "owner" of certain property which the railroads use in performance of terminal activities of the *railroads*, neither of those facts makes the Yard Company a common carrier by railroad subject to the jurisdiction of the Commission.

As to the Yard Company, at least, the court below erred in failing to enjoin the order of the Commission on the ground of lack of jurisdiction.

II

The Yard Company was not properly made a party to the Commission's order whether or not the railroad companies are fulfilling their duties.

The court below found that the Commission's decision was grounded upon the determination of duties imposed upon transporting railroad companies incident to *their* "line-haul" rates. Among those duties, the court declares, is to relieve shippers of any expense in taking their livestock at unloading pens in this public stockyards and passing it through and out of the yards. It was further held that while they have not done so, the railroads ought to engage and compensate the Yard Company for making available to the railroads such enlarged use of its properties and facilities. Failure *hereafter* to agree upon such compensation was said to be covered by Sec. 15 (6) of the Act respecting divisions of through rates.

Thus the statute involved and the decisions of the court and Commission dealing with it have to do with the obligations and duties of the *trunk line* railroads. The holding (whether right or wrong) is that such *trunk line* railroads have not *fully* discharged their obligations to shippers.

If all that were true, it does not show the Yard Company legally at fault. Rather, it negatives Yard responsibility. Even as to concerns which are avowedly common carriers by railroad, this Court declares and applies the rule that one may not be held at fault for the act or statutory liability of another. *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 286 U. S. 366; *Central R. Co. of*

New Jersey v. *U. S.*, 257 U. S. 247; *T. & P. R. Co.* v. *U. S.*, 289 U. S. 627.

The practical situation here before the Court seemingly comes well within the general principle stated. For 65 years the railroads at Chicago have deemed their transportation duty ended upon unloading of the livestock into unloading pens. On its part, the Yard Company, in that whole period of time, has functioned as a public stockyards and has been looking for most of its revenue from consignees and shippers of livestock who have chosen to direct railroads to make shipments to them at this public stockyards. Rightly or wrongly, it is now held, after all those years, that the railroads have made the Yards their "terminal," that as a consequence the railroads owe to the shipping public at such place the same obligations of "free passage" in and out of the Yards as the railroads would owe at yard facilities of their own located on their individual railroads, and that as a further consequence the railroads should enlarge their contractual relations with the Yard Company so as to engage more of its facilities and properties than so far they have chosen to do. While it is believed that such a holding is erroneous as a matter of law, it is submitted that there was no warrant for an order of the Commission directed to the Yard Company as if it were at fault. It has no control over the carrier or shipper. It serves both upon request. It is regulated by the Secretary of Agriculture in its services and charges. Its charges are conceded to be reasonable. It should not be made the victim of a quarrel between carrier and shipper as to who should pay them.

There is need to distinguish the situation from that with which this Court dealt in *Adams* v. *Mills*. There was

no "cease and desist" order involved in that case. At a time when it was a "common carrier by railroad," the Yard Company there had been specifically employed as their agent by the railroads to the extent of performing the "unloading" for railroad account. The railroads published in their tariffs that such expense of unloading would be borne by them by way of compensation to the Yard Company, but stated the amount of the absorption to be 25 cents per car. On its part, the Yard Company tariff then on file with the Commission described what its charge for such unloading would be, and in such tariff proclaimed itself to be the "agent" of the railroads in the performance of the *unloading* service for which it had been employed. When the Yard Company and railroads quarrelled over what the compensation should be for that agency service, the railroad companies, without changing their tariffs, collected from shippers the increased amount which the Yard Company then was demanding in its own amended tariff and turned the excess back to the Yard Company. It was under those conditions that this Court declared that the Yard Company was not "entitled to collect a part of its charges from the shippers"; and it there sustained a "reparation" order under those particular circumstances.

That is to say, in its capacity of railroad agent employed to do a particular thing this Court held the Yard Company could not escape its share of responsibility for having exacted from shippers extra compensation *for the doing of that which it had been employed and was being paid by the railroad companies to do for account of the railroads.*

Here the Yard Company has not been employed by the railroad companies to do more than the unloading and

collection of railroad charges from the shippers dealt with in *Adams* v. *Mills*. It has not been made the "agent" of the railroads beyond that extent. Its compensation from the railroads is not for "yardage" which the shippers and consignees obtain. Its yardage charge assessed against shippers is not for anything which the railroads have employed it to provide or do for shippers or for railroads. It does not collect such yardage charge for account of the railroads nor do the railroads collect it for the account of the Yards. It is the railroad companies and not the Yard Company which are under the obligation of fulfilling whatever the law declares to be the full duty of making "delivery." The Yard Company cannot make the railroads employ its facilities to any greater extent than the railroads wish. Whatever duties the law may put upon the railroad companies, their failure to discharge them is not something for which it can properly be held the Yard Company is responsible.

To say that the Yard Company is at fault would be to make one concern responsible for what is said to be an omission of legal duty by others. This, as heretofore declared by this Court, the Commission may not do.

The Court below cited *Covington Stock Yards* v. *Keith*, 139 U. S. 128, in support of its view that here the Yard Company may be held jointly at fault. But that case did not arise under the Interstate Commerce Act. No question of the jurisdiction of the Commission was involved. Nor did this Court in the *Covington* case make or sustain any order *directing* the Covington Stock Yard Company to rearrange its relationships with railroads and shippers. That case arose in a railroad equity receivership proceeding upon petition of Keith to the receivership court in

which there was sought an order directing the railroad receiver to deliver livestock to a yard owned by Keith. Thereupon the Covington Stock Yards voluntarily entered the case through a petition of its own to the court, which set up its possession of an exclusive contract with the railroad company, according to which the railroad company was precluded from delivering livestock elsewhere than at the Covington Yard. In its petition to the court the Covington Company sought and obtained an order requiring Keith, in that proceeding, to adjudicate with the Yard Company the validity of such exclusive contract.

The issue having arisen in that way, this Court sustained a decree of the Circuit Court holding that the railroad company was not meeting its lawful duties to shippers by virtue of such exclusive contract with the public stockyard company, since, as a result of such contract, the railroad *compelled* consignees to pay yardage charges to the Covington Company on any livestock shipped to that community. Such decree of the Circuit Court further provided that within a time limit thereafter the Covington Yard Company and the railroad should signify to the court a *voluntary* rearrangement of their relationship in such way as that shippers and consignees would be relieved of yardage charges at *that* place *or else the railroad company would be required to make delivery without yardage at the private yard of Keith.*

Thus the Covington Stock Yards was not made a defendant nor was any compulsion applied to it in the form of a court decree *requiring* it to forego yardage charges or to look to the railroad for payment. In the present case there is no refusal of trunk line railroads to deliver without yardage in the various railroad owned yards scat-

tered throughout Chicago. Nor is there refusal of delivery of loaded cars right at the plant of the Hygrade Company without yardage but upon the payment of lawfully established railroad switching charges.

The cases are wholly dissimilar, and nothing in the *Covington* decision of this Court supports the order here directed against the Yard Company.

The court below determined the railroads to be at fault in this matter and said it is their duty to enlarge the scope of their employment of and compensation to the Yard Company. It was further said that should there ensue hereafter failure of agreement as to the increased compensation to the Yard recourse could be had to Sec. 15(6) of the statute for the fixation of "divisions." It is clear, however, that the court below overlooked that the provisions of Section 15(6) apply only as between connecting "common carriers by railroad" which are subject to the Commission's jurisdiction and only to the divisions of "joint through rates" between them which may have been filed with or prescribed by the Commission under Section 6 or 15 of the statute. Those conditions do not here exist. This subordinate error of the court below may have contributed to its fundamental error in holding the Yard Company legally bound by the Commission's order.

For the reasons set forth in Part One of this argument it is, therefore, respectfully submitted that the order of the Commission is invalid as directed to the Yard Company.

PART TWO

The Invalidity of the Commission's Order in Its Entirety

The court below did not sustain the order of the Commission as a lawful exercise of authority to enforce the provisions of Section 15(5) of the Act. The court declared the Commission *possessed* administrative authority to find the yardage charge "unreasonable" as a practice regardless of Section 15(5). For that reason the order was sustained.

Such view ignores that the Commission's report and order do not purport to be an *exercise* of any administrative authority respecting the "unreasonableness" of a practice. The report of the Commission holds the consignee is not "subject" to the yardage charge and does not in terms identify the section of the statute so determined to be violated. The "order" of the Commission speaks of the "unlawful" practice in requiring that it be stopped. Nowhere did the Commission state or indicate a conclusion of "unreasonableness." It made no "basic findings" relevant to a conclusion of "unreasonableness" which would have been required had that conclusion been intended. (*U. S.* v. *B. & O.*, — U. S. —, decided Jan. 7, 1935; *Panama Refining Co.* v. *Ryan*, — U. S. —, decided Jan. 7, 1935; *Florida* v. *U. S.*, 282 U. S. 194; *Wichita, etc.* v. *Public Utilities Commission*, 260 U. S. 48.)

To have found "unreasonableness" would not have been supportable by *Adams* v. *Mills*, 286 U. S. 397, nor by the record before the Commission. At one place in its

report the Commission speaks as if it thought the yardage charge here involved is imposed for the "mere placement" into unloading pens. The court below so interprets the report. If such was intended by the Commission to be the basis for its decision, error of the clearest sort was committed. The yardage charge is imposed for the use of yard properties by consignees and shippers between the unloading pens and their plants outside the yards. It is not imposed for the "mere placement" into unloading pens when the livestock is taken out of the cars. The assessment of the yardage charge has been continuous for 65 years. It has always been collected by the Yard Company from the consignees for its own account. The activity calling for its assessment has always been outside the range of any agency employment of the Yard Company by the railroads. The tariff providing for it is on file with the United States Secretary of Agriculture—not with the Interstate Commerce Commission. Never have the railroads held themselves out to do more than to unload the livestock into the unloading pens within this public yards. Therefore the case was not one going to any question of "reasonableness."

The view of the court below ignored its own statement that before the Commission the case was dealt with by the Commission as one calling for application of Section 15 (5). Moreover, error resulted in determining that Section 15(5) is not a complete statement of railroad duty as to livestock destined to public stockyards. It was based upon the subordinate error of assuming that when Congress, in Section 15(5), declared what the railroad duty should "include," it meant to leave the Commission free to determine that some other and greater duty rested upon the railroads.

The wrongful view of the case followed the argument of Government counsel that both this Court and the Commission have declared the railroads to some extent use the Yard properties as "their terminal." Upon that premise the contention is made that a duty rests upon railroads to provide shippers with "free passage" to public stockyards when, as here, railroads hold themselves out as willing to transport livestock to a public stockyard and have employed some of its facilities in discharging the obligation incurred. Whether such contention rests upon the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, or upon Section 15(5) of the statute is not clear, and in either event would be erroneous. If to some extent the railroads use certain of the Yard facilities as "their terminal," no less do the *consignees* use the Yard facilities for *their* own convenience and purposes. The Yard serves both and neither shippers nor carriers have the right to come upon and use its properties without payment by the user of proper compensation.

The case of *Covington Stock Yards* v. *Keith* would not support this order of the Commission. Unlike the *Covington* case, this is not one in which the railroads refuse to make delivery at their own yards on their own rails without extra yardage charge. It is not one in which railroads refuse to make delivery of loaded cars on the private side track of the Hygrade Company. It is not one in which the railroads have given to the public stockyards an exclusive contract. Nor does the order of the Commission, like the decree in the *Covington* case, provide any alternative. Rather is the present case one in which the Hygrade Company, for its own convenience, seeks to use the Yard facilities and properties as the place to

which it desires the railroads to bring its livestock. This the railroads are willing to do upon condition that the Hygrade Company make its own arrangements with the Yard Company for the privilege of using the Yard properties for that purpose. The railroads have assumed no greater obligation than to unload the stock into suitable pens within the Yards. It is at such unloading pens that the railroads are willing to tender delivery. There is no compulsion by the railroads that the Hygrade Company use the public stockyard facilities as a means of obtaining its shipments. There is a willingness completely to discharge the common carrier obligation by providing "free passage" at the individual railroad livestock yards in Chicago. Nothing in the *Covington* case, under such circumstances, compels the railroads to assume the burden of relieving the Hygrade Company of its expense for "yardage" when using this public yard for its own convenience.

Nor would Section 15(5) support this order. Counsel for the Government seem not to argue to the contrary because it has been their endeavor to support the Commission's order on the other theory. Section 15(5) was, however, the one invoked by the Hygrade Company before the Commission. That amendment deals with the specific subject of railroad livestock delivery obligations at public stockyards. It purports to be a complete and exclusive definition of railroad duty. The commands which it describes are all that Congress intended. It and the Packers and Stock Yards Act are in *pari materia*. The latter was enacted not long after the former. The Packers and Stock Yards Act contemplates that the United States Secretary of Agriculture would have the duty of regulation. The Packers and Stock Yards Act speaks of the jurisdic-

.tion of the Secretary of Agriculture commencing where the jurisdiction of the Interstate Commerce Commission ends. The Congress reveals the thought that Section 15(5) of the Interstate Commerce Act had not gone so far as to make it the railroad duty to make the public yards available to shippers and consignees at railroad expense. Had it been the intention of Congress to require railroads to employ and compensate public stockyards for shipper use of the Yard facilities, that would have caused the jurisdiction of the Commission to be so nearly complete that nothing of consequence would have been left for assignment to the Secretary of Agriculture.

Nor do the terms of Section 15(5) bear out any view that "yardage" must be borne by railroads delivering livestock within public stockyards. In the last sentence of such Section 15(5) Congress distinguished between railroad duties at their own and at public stockyards. Since at their yards the railroads are required to provide "free passage" to shippers and consignees, the requirement that at public yards the railroads shall deliver "into suitable pens" emphasizes the distinction which Congress had in view. To require delivery "into suitable pens" is much less comprehensive than would have been a requirement that railroads provide "free passage" to and from the suitable pens at public yards. The one construction would limit the obligation to requiring the railroads to unload the livestock into suitable pens. The other would require the railroads to employ and compensate the public stockyard for providing facilities by means of which shippers may come upon the properties and use them in removal of their livestock away from the pens.

Section 15(5) was an extension of railroad obligation. Until its enactment no duty even to unload into suitable

pens rested upon railroads at public stockyards when separate yards of their own were provided on their own rails. (*Covington Stock Yards* v. *Keith*, 139 U. S. 128.) The Commission had so held prior to 1920 (*In Re Unloading of Livestock*, 52 I. C. C. 209, decided February 11, 1919); and in this amendment to the Act, Congress sought merely to require that which the Commission previously had held it was not required to do.

This view of the legislative history is confirmed by what former Senator Cummins, Chairman of the Senate Committee on Interstate and Foreign Commerce, said to the Senate in reporting and speaking in favor of the bill. In presenting the Committee view Senator Cummins declared the intent of the legislation was to extend the railroad obligation concerning livestock at public yards "to the point at which it is to leave the car." (See Congressional Record, Vol. 59, p. 674.) The reason assigned by the Senator for this extension of railroad obligation was that livestock growers shipping to public stockyards ought to know that a single railroad rate covered unloading and placement into pens and not risk being taxed with a separate charge for that unloading.

Had Congress intended more the language used would have been different. It was known that public stockyards constitute a separate facility in the nature of a public utility operated for profit. The Congress must have known of the universal exaction of a yardage charge against shippers using these public stockyards. Its whole intent later was revealed by enactment of the Packers and Stock Yards Act. By means of that Act Congress vested the Secretary of Agriculture with jurisdiction to regulate those separate charges of stockyard companies. It had already required railroads to bear the expense of unloading into suitable pens. To have required railroads to

take over and bear the expense of engaging the public stockyards for the accommodation of shippers and consignees would have been to mar a complete, sound and natural system of regulation.

As a sound system of regulation, susceptible of practical enforcement by efficient agencies, the duties of the carriers and of the Interstate Commerce Commission should end and the duties of the shippers and the Secretary of Agriculture should begin precisely at the time and place of unloading into pens. There are upwards of 79 public stockyards in the United States at which the character and volume of service to shippers vary. The right of stockyards to be paid for the use of their facilities is unquestioned. Such charges should be subject to regulation. The Interstate Commerce Commission is not equipped to regulate such charges. To say that such charges should be included in the freight rate seemingly would impose upon the Commission a task which would call for a serious change in the rate structure whenever local conditions change in the Yard, and bring about uncertainty and demoralization, and probably gross discrimination. As a separate facility, yardage charges beyond unloading into pens can be regulated by the Secretary of Agriculture in practical fashion without affecting the transportation rate structure. Such is the system of regulation created by paragraph 5 of Section 15 of the Interstate Commerce Act and by the Packers and Stock Yards Act considered together. Effect is given to that system and full justice is afforded to shippers by the Secretary of Agriculture who by elaborate organization exercises jurisdiction over all customs and practices in the Yards, and regulates all charges. The order of the Commission and of the District Court would displace order and soundness with chaos and injustice.

Conclusion

It is respectfully submitted that the order of the Commission should be annulled and set aside and its enforcement enjoined. The order is invalid as to the Yard Company separately. It is also invalid as a whole.

Respectfully submitted,

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

By CHARLES E. COTTERILL,
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Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1934—Nos. 606 and 607

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*

Appellants

v.

THE UNITED STATES OF AMERICA, *et al.*

Appellees

No. 607

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO

Appellant

v.

THE UNITED STATES OF AMERICA, *et al.*

Appellees

REPLY BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

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IN THE

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Appellants*, *v.* THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 606
THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, *Appellant*, *v.* THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 607

REPLY BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

As in the main brief this short reply is divided into two sections. The first concerns the contention of the Government and the Hygrade Company that the Commission's order was properly directed to the Yard Company. The second consists of only a few observations on the position of appellees concerning the validity of the Commission's order as a whole.

I

On the matter of the Yard Company having been made a party respondent to the Commission's order.

Adversary counsel do not question that the Yard Company separately insisted before the Commission that because of fundamental changes of fact it no longer is a "common carrier engaged in the transportation of property by railroad" within the jurisdiction of the Commission and therefore is not subject to any order of that body. They do not question that the Commission failed even to state that such separate issue as to its lack of jurisdiction was raised and pressed throughout the proceeding. They do not point to any findings by the Commission as to what material changes of fact have occurred from the basis on which the Yard Company insisted before the Commission that jurisdiction no longer existed. Under the circumstances there seemingly would be put upon this Court an unwarranted burden were it to be the law that this failure requires that the Court should find the facts and spell out for the Commission some theory by which to hold the yards. (*U. S.* v. *C. M. St. P. & P. Ry. Co.*, decided by this Court, March 4, 1935.)

Only at the end of their brief do counsel for the Government deal with the question whether the Yard Company is properly subject to the Commission's order as to whether the Yard Company is now a "common carrier engaged in the transportation of property by railroad," Government counsel say no more than that "it would seem", that if it were "necessary" again to determine the question judicially, the answer would be in the affirmative, although the suggestion is not reasoned

out. Without saying more than that on this controlling question of jurisdiction, adversary counsel then shift to the proposition that insofar as concerns *unloading* of livestock the Yard Company is an avowed "agent" of the railroad. Upon that premise it is said that Section 16(7) of the Act would put upon the Yard Company a *criminal* responsibility if, in the capacity of such agent, it did anything in connection therewith which would be in *violation* of the Commission's order against the *railroads*. On that account (it is said) the making of this order by the Commission against the Yard Company is "harmless."

The Yard Company is an "agent" only to a limited extent. No claim is made by adversary counsel that the Yard Company is a railroad "agent" in respect to its facilities and activities availed of by the Hygrade Company in the effort to take livestock out of the unloading pens through the Yard properties into its own plant outside. For a concern to be an "agent" for one purpose does not make it an "agent" for all purposes. In that respect the case now before the Court is readily distinguishable from *Adams* v. *Mills*, 286 U. S. 397. In that case the situation before the Court involved only the matter of the "unloading." While decided long afterwards, that case dealt with a period prior to 1921, at a time when the Yard Company was still a common carrier by railroad. This Court rejected a contention that the Yard Company was then immune to the Commission's order there involved merely because, while being a common carrier by railroad, the things which it did were in the capacity of railroad "agent." It was in such sense that this Court there declared the responsibility of the Yard Company to that order of the Commission then under review was not affected by its "status" as a

common carrier. Here the Yard Company is not a common carrier by railroad; and, in any event, this case concerns things and properties *outside the scope of any agency for the railroads.*

Moreover, it is extreme to say that a civil order of the Commission may be directed to the Yard Company, commanding it to "cease and desist" and to be responsible in damages, on some theory that it is "harmless error" to do so because of its criminal responsibility should the Yard Company, *within* the scope of its carrier agency, hereafter do anything by way of violation of the Commission's order as *directed to the railroads.* Such civil order of the Commission is not "harmless" as to the Yard Company whose independence and liberty of action are sought by the order to be restrained.

For the first time reference now is made by the Government to the provisions of Section 8 of the Elkins Act as if they warrant an order against the Yard Company although otherwise it may not be subject to the Commission's jurisdiction. By this reference to Section 2 of the Elkins Act it is made plan that at least Government counsel do not seek to support the Commission's order against the Yard Company as one grounded upon a determination that the Yard Company is subject to the Commission's jurisdiction and is guilty of a violation of law. Rather is it the obvious endeavor of Government counsel to hold the Yard Company subject to the Commission's order only because it may be *collaterally "interested"* in the dispute between the Hygrade Company and the railroads. It is not pointed out wherein such collateral interest is of a kind enabling the Commission to make any "cease and desist" order against the Yard Company and to require it to pay damages on

past transactions. The "interest" of the Yard Company in the railroad "practice" is not demonstrated. The only Yard Company interest springs from the fact that it was made a party defendant before the Commission and now seeks by this proceeding in court to nullify the Commission's order. Beyond that the Yard Company is not "interested." Were the order of the Commission valid against the railroads (which the Yard Company joins in denying) no lawful requirement of the Commission directed to the railroads need or constitutionally could put upon the Yard Company any burden of assisting the railroads to comply with such an order. The Yard Company is not a contributor to or beneficiary of any violation of the law by the railroad companies such as determined by the Commission. The Yard Company could not control the action of the railroads in that regard. The Yard Company *has not been put by the railroads* into position to make the yardage charge against the shippers as in the case of the Covington Stock Yards. The Yard Company is in business only for itself and the Hygrade Company is not compelled by the railroads to use the Yard facilities. No order of the Commission could constitutionally require the Yard Company to permit railroads to use or pay for the Yard facilities in discharge of any obligation the railroads are said to be under in serving shippers and consignees. The Yard Company is not "affected" by the railroad refusal to arrange and pay for use of the Yard facilities by such shippers and consignees. What the Commission's order seeks to require is that the *railroads* shall assume the obligation to arrange that shippers and consignees may have free access to the unloading pens. What that mode of access should consist of is not even in-

dicated. It would not follow that it would consist of the free use of the Yard properties and viaduct into the Hygrade plant for which the Hygrade Company heretofore has been paying the Yard Company its "yardage" charge. If such a Commission order were to be lawful the railroads would be left to their own determinations of what sort of arrangement to make with the Yard Company and on what terms. No lawful order of the Commission may put upon the Yard Company any degree of compulsion that it accommodate itself to whatsoever such necessities of the railroads should prove to be. The Yard Company would be "affected" and be "interested" in the outcome only in the sense that were the Commission's order held valid against the railroads the Yard Company might anticipate that to meet the Commission's order the railroads would *seek* to make some sort of arrangement with the Yard Company by which the railroad responsibility might be discharged. To argue that a collateral or contingent interest of that kind on the part of the Yard Company would, under Section 2 of the Elkins Act, enable the Commission to coerce the Yard Company by order into the surrender of what otherwise would be its complete liberty of action is to argue that it is within the power of Congress to require that a company which is not a common carrier by railroad shall none the less enter into a contract with those who are common carriers by railroad so that the latter might discharge their determined duties to the public. The "liberty of contract" guaranteed by the Constitution of the United States would preclude any such construction of Section 2 of the Elkins Act as would lead to that kind of result. No case cited by Government counsel supports them in their position.

II

On the matter of the invalidity of the Commission order as a whole.

To avoid duplication of the reply of railroad appellants in No. 606, only a few observations are here indulged concerning the arguments of the Government respecting the Commission's order as a whole.

It is a fair characterization of the brief for the Government to say that it consists of an effort to marshal out of the record a mass of facts *not found by the Commission* and to propose various theories on which the Commission *might* have been warranted in finding a violation of law, but which *it did not describe.* Charged with the duty of defending a Commission order based upon a "report" which is so cryptic in style as this one and significantly lacking in clear-cut determinations either of fact or law there was nothing else for Government counsel to do despite the assurance that under its recent decision on March 4th, in *U. S.* v. *C. M. St. P. & P. Ry. Co.*, this Court will properly annul the Commission's order if on no other ground than that it is not charged with the duty of finding out whether the record before the Commission would display a set of facts on the basis of which some unidentified violation of the Interstate Commerce Act could have been found. The concluding language used by Mr. Justice CARDOZO in the case referred to summarizes the whole situation:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

(a) The contention that the Commission found "no services" are performed by the Yard Company on the shipments involved.

Running through the Government's brief is a reiteration that there are none such shown in the record and the Commission found that there are no "services" performed by the Yard Company on inbound shipments subsequent to unloading of the livestock through unloading pens. No such finding of the Commission was made. The Commission's statement was that "no services are performed *for which an extra charge may be imposed.*" That language amounts to no more than an ultimate conclusion of the Commission that an affirmative order in favor of the Hygrade Company was warranted. Any other construction would convict the Commission of gross inaccuracy because the true situation is that the "yardage charge" is imposed in consideration of the desire of the Hygrade Company to use the Yard properties and special facilities, as well as protection, in taking the livestock out of unloading pens through the Yard properties and over a viaduct into the plant of the Hygrade Company outside the Yards. The Yard Company is not a philanthropic institution. It is engaged in business for the purpose of gain. The railroads have not employed it to make available its yard properties and special facilities to shippers and consignees. Railroad employment of the Yard Company is strictly confined to the unloading of the livestock from freight cars and the rendering of certain minor clerical services. It is entitled to profit upon its heavy investment in public stockyard facilities. It is under no obligation to the railroads or to others to

permit the Hygrade Company to use without charge the viaduct leading into its plant outside the Yard or to use the other Yard properties. The Commission did not and under the record could not find that "no services" are rendered for which the yardage charge is *imposed*.

(b) The argument that Section 15(5) should not be construed to "cut down" the previously existing law.

Counsel for appellees seem not to seek vindication of the Commission's order as if supportable by the provisions of Section 15(5). That is so notwithstanding the only possible construction of the Commission's report (despite the difficulties of construing it at all) that in the judgment of the *Commission*, it is Section 15(5) which is at the base of the order. The position of Government counsel is made even more difficult by the circumstance that while they endeavor to support the Commission's order on some theory other than that it determined a violation of Section 15(5) yet nothing is or can be pointed to in the report indicating *what*, if any, *other* provision of the statute was deemed by the Commission to be violated.

To escape the limiting force of Section 15(5), Government counsel argue that its enactment was "remedial." The argument destroys itself. Being "remedial" the object of its enactment must have been to serve some purpose *not* then embraced within the scheme of the statute as it formerly existed. To say that Section 15(5) was remedial but that it added nothing to the law is to suggest that Congress did a vain and useless thing and remedied nothing.

The whole misconception of Government counsel springs from their endeavor to overextend the significance

of this Court's decision in the *Covington Stockyards* case. The position is taken that by its decision in such case this Court determined that whenever railroads transport livestock *to and from public stockyards* their duties respecting unloading and free access are the same as they would be at yards belonging to the railroads. Such was not this Court's decision. On the contrary, in the case referred to this Court was dealing with an instance in which complaint was made that a railroad *refused* to provide *any* place for the free discharge and delivery of livestock in a given community and sought, by an exclusive contract with a public stockyards, to *compel* shippers to use such public yards and pay extra charges therefor. Giving to the parties before it an alternative this Court merely declared and applied the obvious rule that under the circumstances the railroad should make free deliveries *somewhere else* or arrange with the public yards to do so at that place.

Consequently when Congress enacted Section 15(5) it created a new rule of law applicable to railroad deliveries of livestock at *all public stockyards*. It went so far as to declare that when railroads engaged themselves to transport livestock to *any* public stockyard, they shall be under the obligation to unload into suitable pens within the yards where the shippers may come for their freight and take delivery if they have arranged with the Yard Company for the privilege of doing so. This was an *extension* of the law as it previously existed. For Government counsel to argue now that such special statute need not have been passed and that since 1887 it would have been permissible for the Commission to reach the same result under its authority to prescribe "reasonable practices" is a position not sustained by the decision in the

Covington Stockyard case and is an effort to defend the Commission's order on some ground which even the Commission itself did not declare.

Other important aspects of the contentions of adversary counsel, to avoid duplication, will be dealt with only in the reply brief of railroad appellants in No. 606.

It may well be that there has been too much elaboration of argument on behalf of the Union Stock Yard and Transit Company of Chicago. As to that defendant the gist of the case may, it is submitted, concisely be stated.

A

The Union Stock Yard is a public utility, performing a service for which there is economic need, under governmental regulation designed fully to protect all users. The owner of the Yard is entitled to receive compensation from those who use it. The Hygrade Company elected to use the Yard and used it in having livestock consigned to the Yard and in taking delivery there.

B

Respecting transportation and delivery, consignees must look to the rail carriers for all services covered by the rates which shippers pay. Whether the duty of the carriers, either under the General Law or under Section 15(5), ends with the delivery of livestock to the Stock Yard Company in its unloading pens, for account of consignees; or whether the duty of the carrier is to deliver to consignees at unloading pens,

where access, ingress and egress is provided by the rail carriers under their published transportation rates, the entire duty rests upon the rail carriers and consignees may look only to the rail carriers for performance of that duty, or for damages because of default. The defendant, Union Stock Yard Company, has done no wrong and cannot be held responsible where it has not been at fault. The order of the Interstate Commerce Commission, requiring that the Yard Company shall render services without compensation, or suffer its properties to remain idle and unused, would work a confiscation or destruction of the Yard property. If there has been a failure of duty owed to the Hygrade Company, by the rail carriers, and if the Hygrade Company has been damaged by the withholding of anything that was due, and which as a result the Hygrade Company was compelled to provide or procure, full justice to the Hygrade Company can and may be done appropriately by an order running only against the rail carriers.

Respectfully submitted,

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Appellees.

REPLY BRIEF FOR APPELLANTS.

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INDEX.

	Page
The Facts	1
The Jurisdiction of the Commission	3
The Validity of the Order insofar as it requires the furnishing of special facilities	8
The Lack of Findings	9

Cases Cited.

Adams v. Mills, 286 U. S. 397	4
Covington Stock Yards Co. v. Keith, 139 U. S. 128	5
United States v. Penna. R. Co., 242 U. S. 208	7
United States v. C. M. St. P. & P. R. Co. No. 379, October Term, 1934, decided March 4, 1935	10

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REPLY BRIEF FOR APPELLANTS.

May it Please the Court:

One brief has been filed herein for appellees, the United States and the Interstate Commerce Commission, and a separate brief on behalf of appellee, the Hygrade Food Products Corporation. Both these briefs are lengthy, but the arguments presented may be briefly answered.

THE FACTS.

In both briefs some errors are made in stating the facts and the action taken by the Commission. At page 9 of

the Government brief it is said the Commission held that appellants have refused to deliver livestock at the Hygrade plant at the rates applying on such deliveries made at the stockyard. There should be added the further statement that appellants have not refused to make delivery of livestock at the Hygrade plant if the Hygrade Company would pay the charges found by the Commission to be applicable on such deliveries (R. 176).

At page 10 of the Government brief it is said that the Commission found the yardage charges of the Yards Company were collected without tariff authority, in violation of Section 6 of the Interstate Commerce Act. This is in error, as Section 6 of the Act is nowhere mentioned in the Commission's report or order. The conclusion is one of counsel, apparently drawn from the statement in the report (R. 31) that the Hygrade Company had paid charges found "inapplicable". Further, there is no finding by the Commission that any charges were inapplicable. At page 12 of the Government brief it is said that the Commission recognized the rule that consignees are entitled to a reasonable time in which to remove their shipments from the carrier's premises. No such rule is stated in the Commission's report.

At page 2 of the brief of the Hygrade Company it is said that the Hygrade plant is separated from the stockyard only by a proposed extension of Pershing Road or 39th Street. This is incorrect. As we pointed out at page 49 of our main brief, numerous tracks of the Chicago Junction Railway also lie between the stockyard and the plant of the Hygrade Company. At page 7 of the Hygrade Company brief it is said that the weighing done by the Yards Company is solely for the benefit of the railroads. This is not supported by the record, which shows (R. 129) that the Hygrade Company uses the scale weights secured by it from the Yards Company to check its freight bills. Weights at the stockyard are furnished to the railroads by the con-

signees who secure them from the Yards Company (R. 108, 154), but this is done under a separate arrangement.

THE JURISDICTION OF THE COMMISSION TO MAKE THE ORDER ASSAILED HEREIN.

Much space in both briefs filed for appellees is devoted to the proposition that the Commission had jurisdiction to make the order assailed in this case. The theory of appellees, although there is no finding to that effect, is that the Commission held the Hygrade Company entitled to free access to and egress from the property of the Yards Company in the case of all shipments delivery of which is taken by the Hygrade Company at the unloading pens. This asserted holding is sought to be justified by the argument that the stockyard is a facility of and a point on the rails of appellants; that appellants are required, at such a place, to permit a consignee to remove his property without charge additional to the freight rate; that such removal is a part of transportation and thus within the Commission's jurisdiction, and that there is nothing in the facts or law which relieves appellants from this obligation imposed by the Commission's order.

The argument that the stockyard is a facility provided by appellants on their own rails where they have the obligation of granting free egress on certain shipments of livestock, seems to be based on three asserted grounds. The first is that the Chicago railroads were the original incorporators and constructors of the Yards Company properties, and thus established the stockyard as their livestock delivery point in Chicago. The second is that by a course of dealing, extending over a period of almost seventy years, the railroads have constituted the stockyard as their livestock terminal in Chicago. The third is that appellants have no other points in Chicago where such deliveries can be or are made.

There is an obvious answer to each of these claims. It

is true that almost 70 years ago, $925,000 of the capital stock of the Yards Company was orginally subscribed by nine trunk line railroads serving Chicago (R. 147), but the record is clear that shortly after the Yards Company started operation, those railroads dispossessed themselves of their capital stock in the Yards Company, presumably because of their decision not to establish the stockyard as their own livestock delivery place in Chicago. It was testified that for more than 50 years no railroad company serving Chicago has had any ownership interest in the stockyard (R. 147). The fact is that during this period of more than 50 years the stockyard has been owned and operated by private interests and that no appellant has had any connection with or control over it.

With respect to the second asserted ground, appellees have given consideration only to those facts which suit their argument. It is true that appellants have in point of fact delivered livestock at the stockyard for many years, but as we have argued in our main brief, it is not an enterprise belonging to appellants. It is only an industry served by appellants. Appellant's tariffs show the stockyard as an industry on the Chicago Junction Railway. The only service offered is a delivery of livestock into unloading pens. The fact of appellant's deliveries at the stockyard cannot be separated from the equally important facts that appellant's tariffs limit their obligations to a delivery into the unloading pens, and that the ending of appellant's obligations at those pens has been acquiesced in by all parties for as long a time as the deliveries have been made. If, under all the facts, the practice of making deliveries at the stockyard over a period of years could create a legal status, then the legal status of appellants thus created would be such that they certainly have no obligations beyond the unloading pens.

Much is made by appellees of the statement of this Court in *Adams v. Mills*, 286 U. S. 397, 409, that the stockyard was in effect the livestock terminal of the railroads. As

we have argued in our main brief, this statement was made in connection with the determination by this Court of the obligation of consignees to pay the loading and unloading charges of the Yards Company, a burden which had been assumed by the railroads since the Yards Company had started in business. By reason of the long-existing practice, the stockyard might well be held to be the terminal of the railroads for the purpose of loading and unloading livestock consigned to the stockyard, but in this case the same circumstances on which the holding in the *Mills case, supra,* was based, justify a holding that the stockyard is not the livestock terminal of the appellants for the purpose of rendering any service to consignees after the placing of the animals in unloading pens.

With respect to the third asserted ground, the argument made reduces to the proposition that the maintenance by appellants upon their own rails of facilities through which livestock can be delivered without charge, does not relieve them of that burden on deliveries made at the stockyard. Considerable point is made of the fact that appellants introduced no evidence showing the adequacy of their individually owned facilities. But such proof was not necessary. There is no allegation in the complaint filed by the Hygrade Company with the Commission that those facilities did not exist, that they were inadequate, or that appellants decline to make deliveries through them. The only complaint made of them in the record was that they are not situated at points sufficiently convenient to enable the Hygrade Company to use them without incurring some additional expense. The maintenance of those facilities by appellants satisfies every requirement laid upon appellants by the decision of this Court in *Covington Stock Yards Company v. Keith,* 139 U. S. 128.

As we have argued in our main brief, their existence makes available to the Hygrade Company three methods of securing delivery of livestock consigned to it at Chicago. It may take delivery at the facilities maintained by appel-

lants, in which case it will be required to sustain the expense of removing the animals from those facilities to its plant. It may secure delivery of such animals at its plant, but in such case it must pay the switching charges of the Chicago Junction Railway found reasonable by the Commission in its report, and must also furnish those facilities such as scales, unloading chutes, etc., which it does not now have.

It also has the alternative of a delivery through the Stock Yard. Such a delivery relieves it of the necessity of any further transportation of the animals by truck or otherwise, and relieves it of switching charges and the expense of maintaining facilities of its own. Such facilities are supplied by the Yards Company and for their use the Hygrade Company has hitherto paid the yardage charges of the Yards Company. Yet the decision of the Commission herein affords to the Hygrade Company the right to secure the delivery most convenient to it at no expenditure whatever. Appellants and the Yards Company are required in effect to deliver livestock into the pens of the Hygrade Company, that being the result of the order made.

The entire argument advanced by appellees reduces to the proposition that under the law each of the 79 public stockyards in the country are facilities of the railroads transporting livestock to such stockyards. Their position seems to be that such public stockyards, not owned or controlled by railroads nevertheless become, in course of time, facilities of the railroads, because the conveniences which they supply are such as to cause a large use to be made of them by shippers. If such a theory is true in this case, it is true in the case of every other public stockyard. Thus, the railroads would be required to assume the expense of supplying public stockyard facilities on all shipments of livestock, even though they have facilities of their own which have hitherto been considered as sufficient to discharge all their legal obligations. Appellees assert that this obligation has always existed, even though never as-

serted by anybody, and that the power of the Commission exercised in this case, has existed since the enactment of Section 1 (3) of the Interstate Commerce Act. Such an argument ascribes to Congress, in enacting the Interstate Commerce Act and amendments thereto, an intent which, had it existed, would surely have been plainly declared in the statutes and would not have been, as said by this Court in *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 229:

> "ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed."

In that case, as in this, the majority of the Commission consisted of only one more than the dissenting minority; and there, referring to the position of the minority, this Court said, at page 232:

> "Well might they have recoiled from going to such extreme upon doubtful implication and have been impelled to declare, as they did declare, that if such power was given it logically and necessarily extended to every facility of transportation."

And, as we have argued, the contrary view is plainly indicated by Section 15 (5) of the Act. We do not contend, as stated by appellees, that Section 15 (5) is a limitation upon a previously existing obligation of appellants, but that it was a definite extension of that obligation. The entire argument of appellees is built upon the premise that the Yards Company, operating a public stockyard, is nevertheless a facility of each appellant at which each appellant has the same obligations with respect to delivery as at yards of its own. Since the premise is false, appellees' argument may not prevail. We submit that the only conclusion to be drawn from the evidence and the law is that the Yards Company, in furnishing the service dealt with

in the Commission's order, is acting not as agent of appellants in performing a transportation service, but in its own behalf as a public stockyard, and that as such, neither its services nor its charges therefor are subject to the Commission's jurisdiction.

THE VALIDITY OF THE COMMISSION'S ORDER INSOFAR AS IT REQUIRES APPELLANTS TO FURNISH SPECIAL FACILITIES FOR USE BY THE HYGRADE COMPANY IN REMOVING ITS LIVESTOCK FROM THE STOCKYARD.

In the brief for the Government, it is said at page 100 that the order does not impose upon appellants the requirement that the Hygrade Company be permitted the use of the viaduct or other special facilities owned by the Yards Company in removing its animals from the stockyards. If this were so, we could not complain of the order on this ground. But we direct the Court's attention to the fact that the Commission must have intended to grant to the Hygrade Company the free use of these special facilities, since reparation is awarded to it on all shipments, delivery of which was taken by it at the unloading pens and which were thereafter removed from the stockyards by the use of the viaduct in question.

In the brief of the Hygrade Company it is said (page 24) that this point is not included in appellants' assignment of errors and should not, therefore, be considered here. This is an error, as appellants' assignment of errors (R. 66) and statement of points relied upon (R. 186) assigned as error of the lower court the finding or assumption of that court that the record before the Commission was sufficient to support the order made by the Commission. There was no evidence before the Commission justifying the requirement of the order that these special facilities be made available to the Hygrade Company and, this being true, the assignment made was surely sufficient.

The only further statement of appellees on this matter is that a facility necessary to afford to the Hygrade Company free egress from the stockyard is not a special facility. But, as we have argued in our main brief, the use of this viaduct is not necessary to afford to the Hygrade Company free egress from the stockyard. It only makes that egress more convenient and less expensive to the Hygrade Company, but more expensive to appellants. Such egress, however, could be afforded even though the viaduct was not in existence, and can now be supplied without the use of the viaduct.

THE FAILURE OF THE COMMISSION TO MAKE NECESSARY FINDINGS.

In both briefs filed by appellees it is claimed that the Commission made findings sufficient to support its order. The findings referred to in both briefs are, for the most part, made by counsel and are not contained in the Commission's report. Thus in the brief of the Government it is insisted that there was a condemnation of the yardage charges of the Yards Company under Section 6 of the Interstate Commerce Act. This section of the Act is nowhere mentioned in the report or order of the Commission. On the other hand, the theory of the Hygrade Company is that the Commission made its order under Section 1 (6) and 15 (1) of the Act. (p. 66 of Hygrade Company brief.)

The theory now held by the Hygrade Company is the one advanced by the Commission in the District Court (R. 56) but apparently abandoned by it in this Court. This difference of opinion between the supporters of the order as to the basis upon which the Commission has proceeded is indicative of a major defect in the order. When those supporters of the order cannot themselves agree upon the theory upon which it is made, it would seem that it does not meet the standards of certainty prescribed by this Court.

It is unnecessary to deal in detail with the argument of

appellees on this point. It is sufficient to say that they have assumed the findings which the Commission should have made but did not make. They have assumed that the Commission acted under various provisions of the Act not mentioned in the report; that it made findings as to what was transportation; that the practice condemned was unreasonable; that it had jurisdiction and the Secretary of Agriculture did not; that a determination of the status of the Yards Company was unnecessary. We submit that the burden was on the Commission to state these conclusions, and that they cannot be supplied through inferences of counsel. The Commission has said many things in its report but not with the "simplicity and clearness" which would enable anyone to tell what it has done. Its advocates have apparently been unable to agree on the point, and the parties are left "to choose between conflicting inferences". *U. S. v. C. M. St. P. & P. R. Co.*, No. 379, October Term, 1934, decided March 4, 1935. We submit that the judgment of the lower court should be reversed and the Commission's order set aside.

Respectfully submitted,

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INDEX

	Page
OPINIONS	1
QUESTIONS	2
STATUTES	4
STATEMENT	4
Facts found by the Commission	5
Conclusions of fact and ultimate findings	9
Proceedings in Court below	17
Prior proceedings in this Court	18
SUMMARY OF ARGUMENT	18
ARGUMENT	27
I. The order in question, directing the correction of a practice which results in the assessment of extra charges found to be inapplicable, yet imposed and collected upon interstate shipments, is within the jurisdiction and authority of the Commission under the provisions of the Interstate Commerce Act	27
(a) The Commission's jurisdiction is coextensive with "transportation," as defined in section 1 (3) of the Act, including all services in connection with the delivery of property transported	27
(b) The uncontroverted facts and the Commission's finding upon them show that the complainant obtained no services at the Union Stock Yards other than delivery of its shipments	32
(c) Under the provisions of sections 1 (6), 6 (7), and 15 (1) of the Act, the Commission is authorized to correct unreasonable or unlawful practices of carriers affecting rates or charges and all matters connected with the delivery of property transported	36

119778—35——1

ARGUMENT—Continued.

I. The order in question, etc.—Continued. Page

(d) Nothing in Packers and Stockyards Act, 1921, affects the jurisdiction of the Commission under the Interstate Commerce Act 40

(e) In previous cases the Commission has given careful consideration to the question of its jurisdiction over shipments of livestock to public stockyards and has correctly held that its jurisdiction extends to the point of actual delivery to the consignee 42

(f) Legislative history of Packers & Stockyards Act discloses intention not to restrict jurisdiction of Commission 48

(g) Section 15 (5) of the Interstate Commerce Act, a remedial provision, is to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission 51

Legislative history of section 15 (5) 59

II. The Commission's finding that the Union Stock Yards at Chicago are the livestock terminal of all line-haul carriers bringing livestock to Chicago is supported by precedent and by substantial evidence of record in the present proceeding 69

(a) The fact that the Stock Yards have been used uninterruptedly since their creation in 1865 as the established place of delivery of livestock in Chicago, of all railroads reaching that city, shows sufficiently that they are the livestock terminal of all those carriers 71

ARGUMENT—Continued.

II. The Commission's findings etc.—Contd. Page

(b) The trackage rights of the various carriers over the Chicago Junction Railway to Union Stock Yards, their publication of rates to the Yards, the fact that they maintain an agent there and other facts show that Union Stock Yards is a station on their lines..... 75

(c) The ChicagoUnion Stock Yards are necessarily the carriers' livestock terminal because the great volume of the livestock traffic to and from Chicago could not practically, conveniently, and economically be handled by any other facilities in that city..... 77

(d) The failure and refusal of the carriers to make delivery to complainant, upon the sidetracks in complainant's plant of shipments of livestock consigned to complainant, and the actual delivery of all such shipments at the Union Stock Yards, corroborates other evidence showing that those yards are their public livestock terminal in Chicago..... 79

(e) That the Union Stock Yards are the railroad livestock terminals in Chicago is further shown by the unwillingness of the carriers to change the present practices under which the great volume of the livestock traffic is now delivered through one centralized and exclusive depot, without confusion, congestion, or delay..... 82

ARGUMENT—Continued. Page

III. The existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant is impractical, does not affect the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge, at the carriers' established livestock terminal, the Union Stock Yards 85

IV. The order is adequately supported by essential quasi-jurisdictional and other findings 88

(a) The order is not lacking in definiteness and certainty 96

V. Appellants are under the duty, inhering in every transportation service, to provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. The order in question does not enlarge this duty 99

VI. The long existence of a practice cannot clothe it with immunity 100

VII. The order was properly directed against the Stock Yards Company as well as against the railroads, since it functions for the carriers in providing livestock terminal facilities and in collecting all freight and other charges. In such circumstances the Commission is expressly authorized by statute to direct such an order against the Stock Yards Company and there was no occasion to redetermine its status as a common carrier 101

CONCLUSION 108

CASES CITED

Abilene Case, 204 U. S. 426 24

Adams v. *Mills*, 286 U. S. 397 ..... 22, 27, 39, 70, 86, 99, 106

Advances in Demurrage Charges, 25 I. C. C. 314 12

Allied Packers v. *A., T. & S. F. Ry. Co.*, 161 I. C. C. 641 ..... 21, 42, 86, 95, 161

American Express Co. v. *United States*, 212 U. S. 522 39

Armour Packing Co. v. *United States*, 209 U. S. 56 ..... 39, 51

Page

Atchison, Topeka & Santa Fe Ry. Co. v. *United States* (Pre-Cooling case), 232 U. S. 199 ..... 11, 32
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 279 U. S. 768 ..... 26, 92
Burton v. *Wabash Ry. Co.*, 58 S. W. (2d) 443 68
C. & O. Ry. Co. v. *Westinghouse, etc.*, 270 U. S. 260 ..... 24, 89
C. & A. R. Co. v. *Kirby*, 225 U. S. 155 ..... 24, 39, 89
C. & A. R. Co. v. *T., P. & W. Ry. Co.*, 146 I. C. C. 171 76
Chicago, I. & L. Ry. v. *United States*, 270 U. S. 287 97
Chicago, Rock Island & Pacific Ry. v. *United States*, 274 U. S. 29 56
Cleveland & St. Louis Ry. v. *Dettlebach*, 239 U. S. 588 ..... 19, 29, 56
Covington Stock Yards Co. v. *Keith*, 139 U. S. 128 ..... 14, 19, 20, 27, 36, 44, 47, 61, 100
Dakota Monumental Co. v. *Director General*, 59 I. C. C. 101 12
Danciger v. *Cooley*, 248 U. S. 319 32
Davis v. *Cornwell*, 264 U. S. 560 ..... 24, 89
Demurrage Investigation, 19 I. C. C. 496 12
Erie R. R. Co. v. *Shuart*, 250 U. S. 465 ..... 19, 32
Glens Falls-Portland C. Co. v. *Delaware & Hudson Co.*, 66 Fed. (2d) 490 107
Gobel, Adolph, Inc. v. *B. & O. R. Co.*, 200 I. C. C. 606 ..... 21, 48, 50, 94
International Coal Case, 230 U. S. 184 ..... 24, 88
Interstate Com. Com. v. *Diffenbaugh*, 222 U.S. 42 54
Kahn's, E. Sons Co. v. *B. & O. R. Co.*, 192 I. C. C. 705 ..... 15, 21, 46, 50, 94
Kansas City So. Ry. v. *Albers Comm. Co.*, 233 U. S. 576 ..... 24, 89
Live Stock Loading and Unloading Charges, 52 I. C. C. 209; 58 I. C. C. 164 ..... 22, 69, 71, 102, 103
Loomis v. *Lehigh Valley R. R.*, 240 U. S. 43 32
Louisville & Nashville R. Co. v. *Interstate Commerce Commission* (Private Car case), 282 U. S. 740 ..... 27, 101
Memphis Freight Bureau v. *K. C. S. Ry. Co.*, 17 I. C. C. 90 ..... 10, 16
Merchants, etc., Traffic Association v. *United States*, 231 Fed. 292 107
Mottley Case, 219 U. S. 467 ..... 24, 88
New Haven R. R. v. *Interstate Commerce Commission*, 200 U. S. 361 ..... 39, 52
Norfolk Ry. v. *Public Serv. Comm.*, 265 U. S. 70 ..... 44, 47, 100
North Penn. Railroad v. *Commercial Bank*, 123 U. S. 727 ..... 44, 100
Pennsylvania Co. v. *United States*, 236 U. S. 351 ..... 22, 59
Penna. R. R. Co. v. *Kittanning Co.*, 253 U. S. 319 12
Philadelphia Warehouse Case (*Warehouse Co.* v. *United States*), 283 U. S. 501 ..... 26, 101
Pittsburgh etc. Ry. Co. v. *Fink*, 250 U. S. 577 ..... 24, 89
Power Reverse Gear Case (*U. S.* v. *B. & O. R. Co.*), No. 221, Oct. Term, 1934, decided Jan. 7, 1935 ..... 25, 92
Pre-Cooling Case (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*), 232 U. S. 199 ..... 11, 32

Page

Private Car Case (*L. & N. R. Co.* v. *Interstate Commerce Commission*), 283 U. S. 740 ..... 27, 101
Shreveport Case, 234 U. S. 342 ..... 24, 88
Skinner & Eddy Corp. v. *United States*, 249 U. S. 557 ..... 22, 58
Southern Ry. v. *Prescott*, 240 U. S. 632 ..... 19, 29, 30, 56
Southern Ry. Co. v. *Reid*, 222 U. S. 424 32
Southwestern Horse & Mule Assoc. v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730 ..... 46, 86
Stafford v. *Wallace*, 258 U. S. 495 45
Strauss & Adler v. *New York Central R. Co.*, 188 I. C. C. 487; 153 I. C. C. 609 ..... 13, 21, 45, 84
Swift & Co. v. *Hocking Valley Ry. Co.*, 243 I. C. C. 281 12
Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 ..... 22, 58
Transit Commission v. *U. S.*, 289 U. S. 121 76
United States ex rel. v. *Interstate Commerce Commission*, 73 Fed. (2d) 948 95
United States ex rel. The Kroger Grocery & Baking Co. v. *Interstate Commerce Commission*, No. 622, Oct. Term, 1934 95
United States v. *B. & O. R. Co.* (*Power Reverse Gear Case*), No. 221, Oct. Term, 1934, decided Jan. 7, 1935 ..... 25, 92
U. S. v. *C. & A.*, 148 F. 646, 156 F. 558, 212 U. S. 563 25
United States v. *Milwaukee Refrigeration T. Co.*, 145 Fed. 1007 107
United States v. *Union Stock Yard*, 226 U. S. 286 ..... 39, 71, 72, 102
Warehouse Co. v. *United States* (*Philadelphia Warehouse Case*), 283 U. S. 501 ..... 26, 101

STATUTES CITED

Interstate Commerce Act, 41 Stat. 456, U. S. C., tit. 49:
Section 1 (1) 18, 29, 102, 109
Section 1 (3) 2, 18, 27, 29, 102, 109
Section 1 (6) 20, 36, 110
Section 6 (1) 4, 10, 24, 110
Section 6 (7) 10, 20, 36, 111
Section 10 (1) 39, 112
Section 15 (1) 20, 26, 36, 113
Section 15 (5) 3, 4, 13, 14, 16, 21, 26, 48, 59, 114
Section 16 (7) 27, 105, 114
Section 20 (1) 102, 114
Elkins Act, 34 Stat. 584:
Section 1, U. S. C., tit. 49, sec. 41 ..... 39, 115
Section 2, U. S. C., tit. 49, sec. 42 ..... 27, 107, 118
Packers & Stockyards Act, 1921:
Section 406 (a), 42 Stat. 159, U. S. C., tit. 7, sec. 226 ..... 3, 40, 44, 48, 91, 118
Twenty-eight Hour Law:
34 Stat. 607, U. S. C., tit. 45, c. 4, secs. 71–74 84

In the Supreme Court of the United States

OCTOBER TERM 1934

No. 606

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company et al., Appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, and Hygrade Food Products Corporation

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No. 607

THE UNION STOCK YARD & TRANSIT COMPANY OF Chicago, Appellant

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, and Hygrade Food Products Corporation

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 54), *Atchison, T. & S. F. Ry. Co.* v. *United States*, is reported at 8 F. Supp. 825.

The report of the Commission (R. 24), *Hygrade Food Products Corporation* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, is published at 195 I. C. C. 553.

QUESTIONS

The question presented is the validity of an order of the Interstate Commerce Commission (R. 37) and of the decree of the court below upholding said order (R. 61), which requires the appellants to cease and desist from the practice which subjects the complainant in the Commission proceeding to the payment of yardage charges in connection with interstate carload shipments of livestock consigned to complainant at Union Stocks Yards, Chicago, Ill., in instances where delivery is taken by the complainant at the unloading pens provided for such purposes in the yards.

The principal subordinate questions are:

1. Whether the order is one within the jurisdiction and authority of the Commission under the provisions of the Interstate Commerce Act.

(a) Whether the jurisdiction of the Commission under the Interstate Commerce Act terminates upon the unloading of the livestock into suitable pens in the Union Stock Yards or whether, in view of the special definition of the term "transportation" in section 1 (3) of the Interstate Commerce Act as including "all services in connection with the * * * delivery * * * of property transported," the jurisdiction of the Commission continues until the stock is taken

into possession by the consignee and removed from the premises.

(b) Whether the yardage charges in question are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stock Yards Act notwithstanding the provision in that act that nothing therein shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within the power or jurisdiction of the Interstate Commerce Commission.

(c) Whether the provision in section 15 (5) of the Interstate Commerce Act, that "transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner," with certain exceptions not here relevant, is a limitation upon the jurisdiction of the Commission over "transportation" as defined in section 1 (3) of the Act.

2. Whether the Commission's finding of fact that the Chicago Union Stock Yards are the livestock terminal of all the individual line-haul carriers bringing livestock to Chicago is supported by the evidence.

3. Whether the existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant before the Commission is impractical,

affects the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge for the mere delivery, at the carriers' established livestock terminal in Chicago, the Union Stock Yards.

4. Whether the Commission's findings are adequate to support the order, and whether the order is uncertain and indefinite.

5. Whether the inclusion among the defendants against whom the order was directed of the Stock Yards Company was within the Commission's authority.

STATUTES

Pertinent statutory provisions are set forth in the Appendix.

STATEMENT

The proceeding before the Commission was initiated by complaint (R. 16), which as amended (R. 22) alleged *inter alia* that certain yardage charges assessed in connection with the transportation of interstate shipments of livestock, in carloads, consigned to complainant at Chicago, Ill., for delivery through the Union Stock Yards, were unreasonable, in violation of section 1 of the Interstate Commerce Act, were not published in any tariff on file with the Commission but were assessed in addition to the applicable rates and charges specified in the tariffs so on file, in violation of section 6 of the Act, were assessed in violation of section 15 (5) of said Act, and were in certain respects unjustly discriminatory and preferential, in violation of sections 2 and 3.

Answers to the complaint were filed and thereafter a public hearing was held, at which the facts were developed.[1] Thereafter printed briefs were filed with the Commission; an examiner's proposed report was issued, to which certain exceptions were filed, and the case was orally argued at Washington before Division 5 of the Commission (Commissioners Lewis, Tate and Farrell). Subsequently the case was reargued before the Commission as a whole. July 25, 1933, the Commission rendered its report (R. 24), which was concurred in by Commissioners Farrell (Chairman), Aitchison, Eastman, McManamy, Brainerd, and Tate, with the other commissioners dissenting. (R. 32.) No order was issued at that time but later, at the suggestion of the parties, the aforesaid order of July 2, 1934, was issued and served.

Facts found by the Commission

The essential facts are briefly stated in the Commission's report. (R. 24–37.) Some of these facts, supplemented by explanatory details shown by the record, as to which there was practically no dispute, are as follows:

Complainant is engaged in the meat packing business, and operates a slaughterhouse and packing plant in the Stockyards District of Chicago. (R. 25, 99.) Its plant lies directly north of the unloading pens of the Union Stock Yards, which are

[1] The testimony is before the Court in narrative form. (R. 97–184.) The documentary exhibits are before the Court as original exhibits. The most important ones are in a separate volume, entitled "Original Exhibits."

operated by the Union Stock Yard & Transit Co. (R. 25.) Its plant is reached and served by the Chicago Junction Railway and sidetracks connecting with that railway extend into and run alongside buildings, stock pens, and loading platforms in the plant. (R. 25, 100–102.) Inbound shipments of all commodities, other than livestock, are switched into its plant and delivered there by the Chicago Junction. (R. 25, 103, and Ex. 6.) Outbound shipments of its products are similarly switched from its plant by the Chicago Junction. (R. 25, 26, 104, and Ex. 7.) Complainant purchases substantial quantities of livestock in Nebraska, Iowa, Minnesota, and other western States, and has it shipped to itself in interstate commerce by rail for delivery at and slaughter in its plant at Chicago. (R. 25, 102, 105, and Ex. 10.) None of these shipments has been delivered on the sidetracks in complainant's plant. (R. 25, 115.) Under an arrangement between the railroads and the Yards Company all such shipments have been carried into the Union Stock Yards by the line-haul carriers. (R. 25, 26, 148.)

The rails of the Chicago Junction exclusively reach the Stock Yards (R. 26, 106, 164, and Ex. 1) but the transportation of interstate livestock shipments into the Yards is not performed by that carrier. All the line-haul carriers transporting livestock to Chicago have trackage rights over the Chicago Junction, and they bring in their trainloads of livestock with their own locomotives and crews. (R. 30, 106, 164.) Upon arrival in the Yards they place the cars opposite the

unloading platforms maintained by the Yards Company. These platforms are provided with chutes or inclines connecting them with unloading pens which have capacities sufficient to hold any carload of livestock. (R. 30, 136, 139.) The unloading is done by stockyards' employees as agent for and at the expense of the railroads. (R. 30, 106, 148–150, and Ex. 22.) The consignee may and often does take delivery of his shipments at the unloading pens. (R. 30, 107, 150.) The unloading pens are not adapted to the prolonged holding of animals, or for their feeding, watering and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. (R. 30, 150, 152–153.)

As to about 15% of all shipments consigned to complainant it has taken delivery before the animals were placed in holding pens, and in such instances has driven them from the unloading pens over scales and across and through the ways provided by the Stock Yards Company to complainant's pens and plant, located across a street from the Yards and connected therewith by a subway under the street. (R. 25, 30, 99, 107, 108, 121.) [2]

The rates lawfully applicable to this transportation are the line-haul rates to Chicago, plus a terminal charge of $2.70 per car on shipments from the West and $1.35 per car on shipments from the East. (R.

[2] The record also shows that there is a viaduct from the stockyards leading into the complainant's plant. (R. 121, 139.)

26, 106, 110.) Out of these rates the line-haul carriers pay or absorb the unloading charge of the Yards Company of $1.00 per car. (R. 30, 106, 110-111, and Ex. 22.)

Yardage charges per animal are assessed on all shipments of livestock delivered at the Union Stock Yards, and have been assessed since the establishment of the yards. (R. 27.) In addition to the line-haul rates plus the terminal charge of $2.70 or $1.35 per car, complainant is compelled to pay these yardage charges whether it takes delivery from the unloading pens or subsequently from the holding pens. (R. 107.) These yardage charges are assessed on a per head basis and vary according to the kind of stock, being 35 cents per head on cattle, 25 cents per head on calves, 12 cents per head on hogs, and 8 cents per head on sheep. (R. 27, 108, and Ex. 23.)[3]

A schedule naming these yardage charges (Ex. 23) is filed with the Department of Agriculture in purported compliance with the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159, U. S. C., tit. 7, secs. 181-229) but they are not named in any schedule

[3] The aggregate yardage charges range from about $3.00 per car to a maximum of possibly $20 per car or over. It was testified that in the case of hogs a single-deck car might come in with as few as 24 or 25 hogs, which would make the yardage charge roughly $3.00 for the car. There might be as many as 100 in a double-deck car, resulting in a yardage charge of $13.20. Cattle will average about 28 or 29 to the car, making the yardage charge around $10 per car. Sheep run in double-deck cars 250 or over, making the yardage charge $20 or over per car. (R. 108.) The largest percentage of complainant's shipments are hogs. See Ex. 4.

filed with the Commission under section 6 of the Interstate Commerce Act. (R. 27, 107, 152.)

Conclusions of fact and ultimate findings

Based on a large volume of evidence, which is referred to in a subsequent section of this brief, the Commission made the following finding:

> The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make. (R. 26.)

Closely related to this finding are the findings that no livestock have ever moved by rail to or from the sidings at complainant's plant or to or from rails adjacent thereto (R. 25); that no sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction (R. 26); that defendants have refused to provide for the delivery of livestock at complainant's plant at the rates and charges which apply on livestock delivered at the Union Stock Yards (R. 26); that no carrier, with one exception, delivers or places carload shipments of livestock at any private industry in Chicago (R. 26), the exception being the Burlington in the case of deliveries to the Omaha Packing Company, a subsidiary of Swift & Co. (R. 26); and that Swift & Co., the complainant, and all dealers in livestock in Chi-

cago, other than the Omaha Packing Co., receive direct or buy after receipt by others all inbound livestock at the Union Stock Yards. (R. 26.)

The allegation in the complaint, to the effect that complainant was discriminated against and the Omaha Packing Company was unduly preferred, because sidetrack deliveries were made at the plant of the Omaha Packing Company without yardage charges, whereas complainant was compelled to take delivery of its livestock shipments in the Union Stock Yards and pay its yardage charges, was overruled. (R. 26–27.) The Commission also overruled the allegation that the switching charge of the Chicago Junction which would apply if track delivery were made at complainant's plant was unreasonable. (R. 26, 31.)

The Commission sustained the allegation of the complaint that the yardage charges are not carried in any tariff on file with the Commission and are therefore collected without tariff authority in violation of section 6, but held that "The fact that certain services come within the term transportation as defined in section 1 of the Interstate Commerce Act, and the fact that charges assessed for such services are not in any schedule on file with us are not of themselves sufficient reasons why no charges may be made therefor," citing *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 17 I. C. C. 90. (R. 27.)

In that case, which was decided in 1909, the carrier had performed certain transportation service (refrigeration) and had collected certain charges for

that service without any tariff authority whatsoever. The Commission ruled that where a carrier has performed a transportation service without tariff authority it would not require the carrier to refund the entire amount of the charge, but that it would determine what was a reasonable charge for the service and order repayment only of the amount, if any, which the carrier has collected over and above such reasonable charge. In that case it was established that the carrier actually performed the refrigeration service; and there is no doubt that refrigeration is a transportation service for which a charge in addition to the line-haul transportation may properly be collected. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States* (*Pre-Cooling* case), 232 U. S. 199.

In the case at bar, however, the Commission found that in instances where complainant takes delivery of the stock at the unloading pens, there are no services performed thereafter for which defendants may assess charges. (R. 31.)

It differentiated between such instances and instances where the livestock is passed into the holding pens awaiting delivery to the consignee, finding that a charge for the yardage of livestock after consignee has failed to take advantage of a reasonable opportunity afforded to obtain prompt delivery is not a violation of any provision of the Interstate Commerce Act (R. 29); that what constitutes a reasonable opportunity may be determined from the circumstances at the particular yards concerned. At the Chicago yards, which it found to be "the greatest

livestock terminal and market in the world", where 14 million animals were unloaded in 1930, the magnitude of the business done demands a degree of promptitude in the receipt and removal of animals that is not generally essential, the average time of unloading being about two minutes to the carload. The unloading pens are not adapted, the Commission found, for the prolonged holding of animals or for their feeding, watering, and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. (R. 30.)

The Commission said it does not appear that there is any occasion for placing the animals into holding pens if prompt delivery is desired, and that there cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock and the accomplishment of proper delivery to complainant. (R. 30.)

Though recognizing the generally prevailing rule that consignees of freight are entitled to a reasonable time in which to remove their shipments from the carrier's premises, and are subject to storage or demurrage charges only after the lapse of considerable time, see *Demurrage Investigation*, 19 I. C. C. 496, *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 283, *Advances in Demurrage Charges*, 25 I. C. C. 314, 315, *Penna. R. R. Co.* v. *Kittanning Co.* 253 U. S. 319, 323, *Dakota Monumental Co.* v. *Director General*, 59 I. C. C. 101, the Commission refused to require that

such a period of time be allowed in connection with livestock delivered through the Chicago Union Stock Yards, stating:

> The fact that other freight is subject to storage or demurrage charges only after a lapse of considerable time is not a sufficient reason why a similar rule should apply in respect of yardage charges on livestock. After unloading, livestock requires unusual attention and care such as is not required by other freight. (R. 30–31.)

It said that it had found in *Strauss & Adler* v. *New York Central R. Co.*, 188 I. C. C. 487, that under the provisions of section 15, paragraph (5), of the Interstate Commerce Act and under the 28-hour law (c. 3594, 34 Stat. 607, U. S. C. Tit. 45, c. 4, sec. 71–74), unloading en route is required "into properly equipped pens for rest, feed and water" without extra charge, but that prompt delivery of livestock to complainant at the Union Stock Yards does not require pens so equipped. And the Commission expressly held—

> If placement into such pens is desired, an extra charge therefor is not within the inhibition of section 15 that an extra charge may not be assessed.

It was found that "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is impractical." (R. 26.) The Commission held, however, that "The fact that the line-haul carriers have other places of delivery at Chicago,

where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards." (R. 28.)

The Commission held that section 15(5) of the Act applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards of Chicago, and that under it no extra charge may be made for any portion of the necessary service of delivery into suitable pens, "and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock." (R. 28.)

The Commission cited and quoted from the decision of Mr. Justice Harlan in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, decided March 2, 1891, holding that a carrier of livestock has no right to make a special charge for merely receiving or merely delivering such stock in and through stockyards provided by itself in order that it may properly receive and load or unload and deliver and that, if the carrier may not make such special charges in respect to stockyards which it owns, maintains, or controls itself, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees; and further, that the transportation of livestock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

The Commission's ultimate findings, aside from the finding in reference to the alleged unreasonableness of the switching charge found applicable to carloads of livestock placed for delivery at complainant's plant, were as follows:

> We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens.
>
> We further find that complainant paid charges found inapplicable, was damaged thereby in the amount paid, and is entitled to reparation in that amount with interest. Complainant should comply with rule V of the Rules of Practice. (R. 31.)

Commissioner Eastman concurred in the report as far as it went, with one exception, but did not believe it went far enough, (R. 31–32) stating that his general position in cases of this kind was indicated in his dissenting expression in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, 710, 711. He there expressed the opinion "that the transportation service of defendant carriers on inbound shipments of livestock [to the Cincinnati Union Stock Yards, which had been found to be the station of defendant carriers for the delivery and receipt of livestock at Cincinnati] does not end until the consignee has been given a reasonable time, after notice of the arrival of the shipments at destination, to accept delivery and remove them from the premises," and that "the consignee is lawfully entitled to such

service without penalty of any storage or handling charge paid to the carrier or its agent or to anyone else." He there further said "no pens are 'suitable' for delivery within the meaning of section 15(5) of the Interstate Commerce Act unless they permit of such reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival." As to the case at bar he said: "It does not seem to me that the unloading pens in this instance permit of reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival, and hence that they are not in all respects 'suitable' for delivery within the meaning of section 15(5) of the Interstate Commerce Act." (R. 31–32.) The exception referred to above was that he did not regard as sound the doctrine enunciated in *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 17 I. C. C. 90.

Commissioners Lee, Meyer, Porter, Mahaffie and Miller dissented because they disagreed with the conclusion of the majority to the effect that the yardage charges assailed were inapplicable in instances where delivery is taken at the unloading pens; that section 15 (5) of the Interstate Commerce Act states the full duty of the carriers in the delivery of shipments of livestock at public stockyards; and that the Commission has no jurisdiction over the imposition of yardage charges on livestock after it has been delivered into unloading pens at public stockyards, such jurisdiction having been conferred upon the Secretary of Agriculture by the Packers & Stockyards Act, 1921.

January 20, 1934, defendants petitioned for reconsideration and reargument. This petition was denied by the order of July 2, 1934. (R. 37.)

Proceedings in Court below

Bill, subsequently amended, (R. 3) was filed by a number of the railroads against which the order was directed to enjoin and set aside the order, naming the United States and the Commission as defendants, and they filed answers. (R. 38, 42.) The Union Stock Yard Transit Company intervened as plaintiff. (R. 47.) The Hygrade Food Products Corporation intervened as defendant (R. 48) and filed an answer. (R. 50.) Hearing was held before a three-judge court consisting of Circuit Judge Martin T. Manton and District Judges John C. Knox and Henry W. Goddard.

October 30, 1934, Circuit Judge Manton delivered the opinion of the Court stating its findings of fact and conclusions of law, (R. 54–61) and this was concurred in by the other two judges. The Court fully sustained the Commission's order.

Final decree dismissing the bill for want of equity was filed November 3, 1934. (R. 61.)

The effective date of the Commission's order of July 2, 1934 was September 20, 1934. (R. 38.) At the request of the district court the Commission postponed this effective date to November 5, 1934. A thirty-day stay of the Commission's order was granted by the district court. (R. 70–71.)

Prior proceedings in this Court

An application was made to Mr. Justice Stone for a further stay of the Commission's order until the determination of the appeals in this Court, and in view of the circumstances and of the bond which appellants offered to give neither the United States nor the Commission nor the Hygrade Company opposed the stay and it was granted by order of Mr. Justice Stone November 15, 1934. (R. 79–80.)

SUMMARY OF ARGUMENT

I. The yardage charges in question were imposed as an extra charge in connection with the delivery, and for the mere delivery, of interstate shipments of livestock. The livestock were purchased by complainant in various western states and were intended for delivery at and slaughter in complainant's plant. All complainant wanted was transportation and delivery of its shipments. They were taken into the Union Stock Yards and complainant in order to get delivery was compelled to go into the Yards and to pay the yardage charges for the privilege of taking them out. The question of the legality and reasonableness of such charges, assessed in connection with the delivery of interstate shipments, is within the Commission's jurisdiction. By section 1 (1) the provisions of the Act are made to apply to the interstate transportation of property and in section 1 (3) "transportation" is defined as including, among other things, "all services in connection with the * * * delivery * * * of property transported." The

Commission's jurisdiction is coextensive with "transportation" as so defined. *Cleveland & St. L. Ry.* v. *Dettlebach*, 239 U. S. 588, *Southern Ry.* v. *Prescott*, 240 U. S. 632, *Erie R. R.* v. *Shuart*, 250 U. S. 465.

The delivery which a carrier of livestock is under the duty to make cannot be safely or effectively made except in or through enclosed yards or lots, convenient to the place of unloading. The duty to receive, transport and deliver livestock will not be fully discharged unless the carrier makes such provision at the place of unloading as well as enable it to properly deliver the stock to the consignee. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128. Such provision has been made by the Chicago carriers under an arrangement whereby the Chicago Union Stock Yards are their livestock terminal at Chicago, providing for them the means of making the deliveries which they are under obligation to make. In connection with the transportation of interstate shipments of livestock consigned to those yards as a mere place of delivery, the Yards function not as a public stockyard but as the agent of the carriers in providing the facilities for delivery. The provisions of the Interstate Commerce Act and jurisdiction of the Commission thereunder apply to all services and charges in connection with such deliveries.

The uncontroverted facts and the Commission's finding under them show that the complainant obtained no services at the Union Stock Yards other than delivery of its shipments. The only instances in which the order here in question ap-

plies are instances in which the complainant-consignee took delivery at the unloading pens. The animals were driven by complainant's employees from the unloading pens direct to its plant, stopping only for weighing the animals, which is a carrier service. No yardage service was furnished. The yardage charges were assessed on the sole ground that complainant had to drive the animals across the property of the Yards Company. This was mere egress from the Yards. No extra charge may lawfully be made against a consignee for the privilege of taking his goods from the carrier's terminal. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128.

Under the provisions of sections 1 (6), 6 (7), and 15 (1) of the Act the Commission is authorized to correct unreasonable or unlawful practices of carriers affecting rates or charges in all matters connected with the delivery of property transported.

Packers & Stock Yards Act, 1921, provides that nothing therein shall affect the power or jurisdiction of the Interstate Commerce Commission. The order in question, having relation to the delivery of livestock transported in interstate commerce, is within the jurisdiction of the Commission and therefore is not affected by Packers & Stock Yards Act or the jurisdiction of the Secretary of Agriculture thereunder. Complainant made no objection to yardage or other charges assessed by the Stock Yards Company in instances where it sought and obtained stockyards' services, as in instances where it purchased

livestock from commission men and traders doing business in the Yards.

In previous cases the Commission has given careful consideration to the question of its jurisdiction over shipments of livestock to public stockyards and has correctly held that it has jurisdiction where no stockyards' services are performed and where the stockyards are used by the carriers merely as a place of delivery of interstate shipments. *Allied Packers* v. *A., T. & S. F. Ry. Co.*, 161 I. C. C. 641; *Strauss & Adler* v. *N. Y. C. R. Co.*, 153 I. C. C. 609; *Kahn* v. *B. & O.*, 192 I. C. C. 705; see also *Gobel* v. *B. & O. R. Co.*, 200 I. C. C. 606.

Section 15 (5) of the Interstate Commerce Act is a remedial provision entitled to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission. Under this provision it is the duty of railroads transporting ordinary livestock destined to public stockyards to make delivery at such yards into suitable pens without extra charge. This provision enlarges the Commission's jurisdiction because under it it must determine the suitability of the pen. A pen is not suitable unless the consignee can take delivery from it without extra charge, where the pen is an unloading pen and the consignee is on hand at the time of the unloading from the railroad cars and takes delivery then and there without wanting or obtaining any stockyards' service.

Section 15 (5) did not restrict the Commission's jurisdiction over transportation as defined in section 1

and did not relax the common law duty of carriers to make delivery. Each provision of the Act must be given a reasonable construction with a view to carrying out all its provisions. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 443, *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567, *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 366. Nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stock Yards Act, and nothing in the legislative history of that Act indicates an intention to relieve common carriers from their time-honored duty of making delivery of livestock without extra charge through their established livestock terminal whether owned by themselves or hired from somebody else.

II. The Commission's finding here that the Union Stock Yards at Chicago are the livestock terminal of all line-haul carriers transporting livestock to Chicago is supported by precedent and by substantial evidence of record in the present proceeding. In *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 224, the Commission found that the Chicago Stock Yards are the terminals for the receipt and delivery of the railroads utilizing them. In *Adams* v. *Mills*, 286 U. S. 397, 409, the Court said it is clear the yards are in effect terminals of the railroads, that "they are in fact used as terminals, and necessarily so." The fact that the Stock Yards have been used uninterruptedly since their creation in 1865 as the established place of delivery of livestock in Chicago, of all railroads reaching that city, shows they are

the livestock terminal of all those carriers. The trackage rights of the various carriers over the Chicago Junction Railway to the Union Stock Yards, their publication of rates to the Yards, the fact that they maintain an agent there and other facts show that Union Stock Yards is a station on their rails. The Yards are necessarily the carriers' livestock terminal because the great volume of the livestock traffic to and from Chicago could not practically, conveniently, and economically be handled by any other facilities in that city. The failure and refusal of the carriers to make delivery to complainant upon sidetracks in its plant of shipments of livestock consigned to it, and the actual delivery of all such shipments in the Union Stock Yards, corroborates other evidence showing that those Yards are their public livestock terminal in Chicago. That this is so is further shown by the unwillingness of the carriers to change the present practices under which the great volume of the livestock traffic is now delivered through one centralized depot, without confusion, congestion or delay.

III. The existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant was found by the Commission to be impractical, does not affect the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge, at the carrier's established livestock terminal, the Union Stock Yards.

IV. The order is adequately supported by essential quasi-jurisdictional and other findings. The asserted

lack of finding of a violation of any provision of the law overlooks the findings (a) that the extra charges in question, applied in connection with the transportation of interstate shipments, were not published in tariffs filed with the Commission; (b) that no services were performed after the unloading in instances in which the consignee took delivery at the unloading pens for which defendants may lawfully assess charges; (c) that in such instances carload shipments of livestock consigned to complainant at the Union Stock Yards are not subject to yardage charges; (d) that such charges in those circumstances are "inapplicable." The finding of a violation of section 6 alone was sufficient to support the order. The chief purpose of the Act was to secure uniformity of treatment to all and the principal provision seeking to obtain this end was to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. *Shreveport* case, 234 U. S. 342, 356, *Abilene* case, 204 U. S. 426, 437, *Mottley* case, 219 U. S. 467, *International Coal* case, 230 U. S. 184, 197, *K. C. S. Ry.* v. *Albers Comm. Co.*, 223 U. S. 576, 597, *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U. S. 577. Where there is a departure from the tariffs duly filed with the Commission discrimination is presumed as matter of law. *C. & A. R. Co.* v. *Kirby*, 225 U. S. 155, *Davis* v. *Cornwell*, 264 U. S. 560, *C. & O. Ry.* v. *Westinghouse*, 270 U. S. 260. Under these cases it is to be presumed, as a matter of law, that the departure from section 6, found by the Commission in this case, resulted in undue preference

and discrimination. Filing the yardage charges with the Secretary of Agriculture could not cure this violation of section 6 nor satisfy the purpose of that provision. That tariff could have no lawful application to transportation or any part thereof. Nor was the tariff given the publicity required by the Interstate Commerce Act so that shippers could ascertain in the manner contemplated by the Interstate Commerce Act the full amount of the charges applicable to their shipments. *United States* v. *C. & A.*, 140 F. 646, 156 F. 558, 212 U. S. 563.

But the Commission did not rest its decision solely on the section 6 violation but proceeded to determine whether there were any services performed for which a reasonable charge might be made and found that there were no such services, the carrier not being entitled to assess an extra charge against the consignee for the mere privilege of taking his shipments out of the carrier's terminal.

Thus the Commission here made the quasi-jurisdictional findings essential to the constitutional or statutory validity of the order. *United States* v. *B. & O. R. Co.*, decided January 7, 1935. Having found that the extra charges were imposed in violation of section 6, and further that aside from that violation, no services were rendered for which an extra charge could lawfully be made, it then was authorized and required to exercise its jurisdiction under section 15 (1) and make an order directing the removal of the practice. Since the Commission found the practice to be *ipso facto* unlawful, there could be no question

as to the unreasonableness of the practice. *A., T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 773. Section 15 (1) gives the Commission jurisdiction over practices which are violative of any provision of the Interstate Commerce Act. The reasonableness of the line-haul rates was not in issue. The findings under section 15 (5) were adequate. Many of appellants' contentions as to lack of findings amount to no more than a complaint because the Commission did not repeat in its report here discussions in earlier reports on the same questions of *law*. The Commission found that the Union Stock Yards function as agent of the line-haul carriers in the delivery of livestock. The order is not lacking in definiteness and certainty. It leaves the carriers free to comply with its plain terms by any appropriate action. Nor is there any uncertainty as to the circumstances in which the yardage charges may or may not be imposed. The order plainly provides that such charges may not be imposed "in instances where delivery is taken at the unloading pens provided for such purposes."

V. Appellants are under the duty, inhering in every transportation service, to provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's terminal. The order in question does not enlarge this duty. It makes no requirement as to any particular facilities for this purpose.

VI. The long existence of a practice cannot clothe it with immunity. *Warehouse Co.* v. *United States*,

283 U. S. 501, *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission*, 282 U. S. 740.

VII. The order was properly directed against the Stock Yards Company as well as against the railroads, since it functions for the carriers in providing livestock terminal facilities and in collecting all freight and other charges. In such circumstances the Commission is expressly authorized by section 2 of the Elkins Act to direct such an order against the Stock Yards Company, and there was no occasion to redetermine its status as a common carrier. Moreover, the Stock Yards Company, insofar as it acts as agent for the carriers, would be bound by the order under section 16 (7) of the Act and hence the inclusion of the Stock Yards Company, if erroneous, was harmless. It could act as agent of the line-haul carriers regardless of its status as a common carrier. *Adams* v. *Mills*, 286 U. S. 397.

ARGUMENT

I

The order in question, directing the correction of a practice which results in the assessment of extra charges found to be inapplicable, yet imposed and collected upon Interstate shipments, is within the jurisdiction and authority of the Commission under the provisions of the Interstate Commerce Act.

(a) The Commission's jurisdiction is co-extensive with "transportation", as defined in section 1 (3) of the Act, including all services in connection with the delivery of property transported.

As pointed out by Mr. Justice Harlan in the *Covington Stock Yards* case, 139 U. S. 128, "when livestock reach the place to which they are consigned,

it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading." In other words, "the duty to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee."

The carriers transporting livestock to Chicago have made such provision under an arrangement with the Union Stock Yards & Transit Co. As found by the Commission, the Chicago Union Stock Yards are the livestock terminal at Chicago of all the individual line-haul carriers transporting livestock to Chicago, and they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make. (R. 26.) As shown later (section II, *infra*) this finding of fact is supported by precedent and substantial evidence in this proceeding.

The Commission also found that the Union Stock Yards are public stockyards. (R. 26, 28.) But their function as public stockyards is different both factually and legally from their function as the livestock terminal or depot of the railroads. In connection with the transportation of interstate shipments of livestock consigned to those yards as a mere place of delivery, the Yards function not as a public stockyard

but as the agent of the carriers in providing the facilities through which the carriers make the deliveries which they are legally obligated to make.

The provisions of the Interstate Commerce Act and the jurisdiction of the Commission thereunder apply to all services and charges in connection with such deliveries. Under section 1 (1) the provisions of the Act are made to apply to the interstate transportation of property, and under paragraph 3 of that section the term "transportation" is given a special definition enlarging its ordinary meaning and causing it to embrace much more than the actual *movement* from origin to destination. It includes, among other things "all services in connection with the * * * delivery * * * of property transported."

The term "transportation" as defined in the Act has been construed by this Court in *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, *Southern Ry.* v. *Prescott*, 240 U. S. 632, and others, and these cases are here relevant because they make it clear that the Commission's jurisdiction is co-extensive with the *transportation* of interstate commerce as that term is enlarged by the statutory definition, attaching with the beginning of transportation as defined in the Act and ending only when the defined transportation terminates, because they hold that delivery is part of such transportation, and because they indicate when such delivery legally takes place.

In *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, Mr. Justice Pitney referred to the letter and

policy of the Commerce Act, and especially the provision of the Hepburn amendment of 1906 which enlarged the definition of the term transportation. "From this and other provisions of the Hepburn Act," he said, "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

That case related to a shipment of household goods from Denver, Colo., on September 18, 1911, to Cleveland, Ohio, where they arrived September 27 but were not called for by the consignee, and remained in the possession of the carrier as warehouseman for over a month, when part of them were lost. It was held that the "transportation" had not ended, in view of the definition of that term in the Commerce Act.

In *Southern Ry.* v. *Prescott*, 240 U. S. 632 (1916), the Court, speaking through Mr. Justice Hughes, again had occasion to refer to the Act's definition of transportation:

> By the Act to Regulate Commerce (section 1) the "transportation" it regulates is defined

as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." It is made the duty of the carrier "to provide . . . such transportation upon reasonable request therefor." All charges made for "any service" rendered in such transportation must be "just and reasonable." Section 6 requires that the carrier's schedules, printed as provided, "shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." And it is further provided, in the same section, that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation"—that is, as defined—"except such as are specified in such tariffs." The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service

> forming a part of the "transportation" in the sense of the Federal Act and governed by that Act. (*Ibid.*, 637.)

The Court then quoted with approval the above-quoted language from the *Dettlebach* case and added that "the terminal services incident to an interstate shipment are within the Federal Act, * * *." It was held that the shipment there involved was still in the course of "transportation" though the goods had arrived at destination, notice of the arrival had been given the consignee, the entire freight charges had been paid, the consignee had given a receipt for the goods, and part of them had been taken away from the freight station.

See also *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43; *Atchison Ry. Co* v. *United States*, 232 U. S. 199, 212; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 441; *Danciger* v. *Cooley*, 248 U. S. 319, 327.

Under the above decisions it is clear that property shipped remains under transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station; in other words, delivery is not complete until the goods are removed from the carrier's possession and premises.

(b) The uncontroverted facts and the Commission's finding upon them show that the complainant obtained no services at the Union Stock Yards other than delivery of its shipments.

It is clear and undisputed that the consignee obtained no stockyards services in instances in which he

took delivery at the unloading pens—and these are the only instances in which the order here in question applies. In all such instances the consignee has driven the animals directly to its plant, stopping in the yards only long enough to have the animals weighed, and this service is admittedly performed by the Stockyards Company as agent for the railroads, for the weights so obtained are used as a basis for the computation of the freight charges which are collected by the Stockyards Company also as agent for the railroads. (R. 106, 107, 150, 155.) The only service claimed to be performed by the Yards Company in such instances is the use of its property in driving the animals out of the yards. The general manager of the Yards Company testified that its activities with respect to livestock fall into two distinct categories, first, "loading and unloading livestock for the railroads which haul such stock to and from the stock yards" (R. 148); second, "furnishing a stock yards service to shippers and consignees of live stock". (R. 151.) After describing this second service, and stating that "It includes in fact all of the services performed by the Yards Company except those heretofore described as constituting the unloading service and the service of loading livestock," (R. 152) he stated that "a service additional to the unloading service is performed by the Yards Company, even on livestock of which possession is taken by consignees immediately upon unloading and while the stock is in the chute pens," namely: "Such animals must be driven across property of the Yards

Company, there being no other way of getting the animals from the chute pens to a location outside the yards." (R. 152.)

The testimony of complainant's traffic manager was to the same effect. He testified that the yardage charge "is a charge imposed by the Union Stock Yard & Transit Company to cover the delivery of the stock to us after it has been unloaded from the cars." (R. 107.) As to what service is performed for the yardage charge he testified that—

> in some instances the hogs are driven by employees of the Stock Yard Company from the unloading chutes to the holding pens, where they have access to water. At that point they are held under lock and key until delivery is made to our employees, who drive them from those pens. In other instances, our own employees accept delivery at the unloading chutes, drive the animals direct to the scales and from the scales to our plant. The latter procedure is followed in about 15 percent of the direct shipments. Eighty-five percent of the direct shipments are put in holding pens where we accept delivery later, and in 15 percent of the cases the Hygrade Company take delivery at the unloading chute. The [yardage] charge is the same in both cases. When animals are placed in holding pens by stockyards employees, I do not think there is any other service rendered than that I mentioned. If such animals are fed or bedded we pay an additional charge for that. It is not covered by the yardage charge. After the delivery of the stock to us either at the chutes or in the

> holding pens, our men drive the stock to the scales where they are weighed by the weighmaster of the Stock Yards Company. Our men then drive the animals from the scales to our plant. No other service is performed by Stock Yards employees after weighing. (R. 107–108.)

The stock yards witness did not claim there was a "yardage service" performed in such instances but his testimony indicates to the contrary by his affirmative statement that such yardage service was performed in the other instances in which the consignee did not take possession while the animals were in the chute pens. His statement reads:

> On all animals of which the consignee does not take possession while they are in the chute pens, a yardage service is also performed. As explained, these animals must be removed almost immediately to other pens and are there held for sale, and during this time they receive the stockyard services which I have mentioned. (R. 152–3.)

It may be noted here that the stock yard's general manager conceded that it was permissible and practicable for the consignee to take delivery at the unloading or chute pens provided it is done at the time of the unloading of the animals.

His testimony was:

> Consignees may take delivery of animals at the chute pens if they so desire, but if this is done it must be done almost simultaneously with the unloading of animals into the chute

> pens. This immediate removal of animals from the chute pens is absolutely necessary in order to preserve an even flow of livestock from the cars into the yards. If the consignees are not prepared to take delivery of animals consigned to them immediately upon their placement in the chute pens, they are removed from the chute pens to other pens by employees of the Yards Company. (R. 150.)

In the light of the above testimony the Commission made its finding that "It is here demonstrated that there are no services performed after unloading for which the defendants may assess charges, in instances where delivery is taken at the unloading pens." (R. 31.)

This testimony and the Commission's holding upon it, considered with the finding that the Chicago Union Stock Yards are the livestock terminal at Chicago of all the individual line-haul carriers transporting livestock to Chicago, and that they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make, show that the extra charge in question was imposed in connection with the *delivery* of interstate shipments of livestock and was a charge for the mere delivery in the sense that that expression is used in the decision of Mr. Justice Harlan in the *Covington Case*.

(c) Under the provisions of sections 1 (6), 6 (7), and 15 (1) of the Act, the Commission is authorized to correct unreasonable or unlawful practices of carriers affecting rates or charges and all matters connected with the delivery of property transported.

The order in question requires the defendants named therein to cease and desist from the practices described in the report "which subject complainant to the payment of yardage charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes."

In the report the finding is made that the extra charges assessed in connection with the delivery of the shipments in question, denominated yardage charges, are not published in any schedule on file with the Commission. (R. 27.) The further finding is made "that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens," (R. 31) and this is followed by the findings "that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens," and that in such instances the yardage charges are "inapplicable." (R. 31.)

The effect of the order, read with these findings, is that the yardage charges, assessed as extra charges in addition to the regular published and filed rates

for the transportation, are not applicable in instances in which delivery is taken by the complainant at the unloading pens, and that therefore the defendants should cease and desist from their practices which subject complainant to the payment of such charges.

Such an order is within the authority of the Commission under the provisions of Section 1 (6), 6 (7), and 15 (1) of the Interstate Commerce Act. Section 1 (6) makes it the duty of common carriers to establish and observe reasonable regulations and practices affecting rates, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property, and declares every unjust and unreasonable classification, regulation, and practice to be unlawful.

Section 6 requires all rates and charges assessed for transportation subject to the Act to be published, filed with the Commission, and posted at stations, and such schedules shall plainly state, *inter alia*, "all terminal charges," "all privileges or facilities granted or allowed" and "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." Paragraph 7 of section 6 provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the

rates, fares, and charges which are specified in the tariff filed and in effect at the time * * *."[4]

Provisions for the enforcement of these substantive enactments are contained in section 15 (1) which provides that whenever, after full hearing, the Commission shall be of opinion that any practice whatsoever of any common carrier subject to the Act is or will be unjust or unreasonable, *"or otherwise in violation of any of the provisions of this Act,"* the Commission is authorized and empowered to determine and prescribe what practice is or will be just and reasonable to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation.

In *Adams* v. *Mills*, 286 U. S. 397, the Commission's holding that the extra charge there involved was an unlawful practice was challenged by the railroads and the Stock Yards Company. After referring to the Commission's findings, the Court, sustaining the order, said:

> If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchi-*

[4] Penalties for violation of this provision are provided in section 10 (1), and the Elkins Act makes it a criminal offense for a carrier to deviate from its established tariffs. *Armour Packing Co.* v. *U. S.*, 209 U. S. 71; *U. S.* v. *Union Stock Yards*, 226 U. S. 287; *American Express Co.* v. *United States*, 212 U. S. 522, 530; *N. Y., N. H. & H. R. R. Co.* v. *I. C. C.*, 200 U. S. 361; *C. & A.* v. *Kirby*, 225 U. S. 155, 164.

son, T. & S. F. Ry. Co. v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311.

(d) Nothing in Packers and Stockyards Act, 1921, affects the jurisdiction of the Commission under the Interstate Commerce Act.

In enacting the Packers and Stockyards Act the Congress was careful to preserve the full jurisdiction of the Commission. Section 406 (a) of that Act (42 Stat. 159, U. S. Code, Tit. 7, sec. 226) provides:

> Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary [of Agriculture] concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

Since the subject-matter of the order in question is within the jurisdiction of the Commission, having relation to the delivery of livestock transported in interstate commerce, it is not affected by the Packers and Stockyards Act or the jurisdiction of the Secretary of Agriculture thereunder.

It is important to note that complainant made no objection to the yardage charges or other charges assessed by the Stock Yards Company in instances where it sought and obtained stockyards' services. (R. 120.) The record shows that complainant purchases substantial quantities of livestock from commission men and traders doing business in the yards. (R. 26, 102.) It made no complaint against the yardage or other charges assessed by the Yards Company on such livestock, pointing out that in such

instances the pens of the company are used for holding the livestock and as a place of business for its purchase and sale. (R. 120, 138.) In such instances the stock is also fed and watered by the Yards Company. For these services it imposes separate charges in addition to the yardage charges, as published in its tariff (Ex. 23) on file with the Secretary of Agriculture under Packers & Stock Yards Act, 1921. Its complaint to the Commission brought in issue the legality of the yardage charges only when assessed on interstate shipments consigned to the complainant for delivery at its plant in Chicago. In the record such shipments are frequently referred to as "directly consigned" shipments to distinguish them from shipments consigned to commission men at the yards. (Cf., *Adams* v. *Mills*, 286 U. S. 397.) [5]

[5] Complainant's traffic manager while testifying stated: "We complain of the assessment of the yardage charges of the Stock Yards Company on livestock consigned direct to our plant and received through the Stock Yards Company but do not complain of the charge on cattle which we buy in the stockyards. We do not pay any yardage charges directly on cattle [livestock] we buy at the Stock Yards but we certainly pay it when we pay for the cattle. We do not complain of that charge because the cattle are afforded further service such as sales service. The Yards Company furnishes sales pens for the commission men to sell the cattle in and they are moved from one point to another. The animals are driven when necessary, are furnished pen service when necessary, and are furnished water." (R. 120.) Later the witness stated: "*All we are asking is free delivery on livestock billed to us direct.*" (R. 120.) Complainant's counsel stated, "I would like to make this statement for the record, and that is that the basis of our complaint is that the service which the Stock Yards Company renders for us is a

(e) In previous cases the Commission has given careful consideration to the question of its jurisdiction over shipments of livestock to public stockyards and has correctly held that its jurisdiction extends to the point of actual delivery to the consignee.

In *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, the entire Commission gave careful consideration, upon appeal from a decision of a division of the Commission, to the question of its jurisdiction over shipments of livestock to public stockyards. The stockyards there involved were owned and operated by the New York Central Railroad Company at Buffalo, N. Y. The shipments involved had been transported by the railroad from origins in other states, and were delivered through these stockyards. The charges assailed, labeled storage charges, filed with the Secretary of Agriculture under Packers and Stockyards Act, which were similar in principle to the "yardage" charges here involved, covered the service of furnishing the chutes, pens, driveways and runways necessary to remove the stock from the cars at the unloading point in the yards and take it from that point out of the stockyards. These charges were assessed, as in the case at bar, even when the

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service of delivery which is part of the transportation service, *and that is all we want and all we require.* Now, the Stock Yards undertakes to do more than that in the case of some of its patrons, and sometimes it does more than that for us. As to these other patrons and ourselves, when we buy on the Yard we have no complaint to make of the Stock Yards charge. The purpose of this testimony was to show what this other service was as to which we make no complaint, for the purpose of distinguishing our situation in which we require one delivery." (R. 138.)

complainant's employees were waiting and ready to receive the stock at the time of its arrival and unloading from the cars, and when, as here, the unloading and driving of the stock through the stockyards was, as far as practicable, one continuous movement and transaction. The division of the Commission had held, 144 I. C. C. 377, among other things, that section 15 (5) of the Interstate Commerce Act required defendants to unload complainant's shipments into suitable pens, but that the transportation ended when the stock was unloaded into the chutes or storage pens and that thereafter it was subject to the provisions of the Packers and Stockyards Act, 1921. After reargument of the case on appeal before the Commission the decision of the division was reversed.

The Commission referred to the provisions of section 1, pars. (1) and (3), of the Interstate Commerce Act and said that under section 1 (1) the Act applies to common carriers engaged in the transportation of passengers or property by railroad; that section 1 (3) defines the term "railroad" as including all terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property; that the term "transportation" is defined as including all instrumentalities and facilities of shipment or carriage and all services in

connection with the receipt, delivery, storage, and handling of property transported. (161 I. C. C. 643.)

The Commission further said that the undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession, citing *North Penn. Railroad* v. *Commerical B'k.*, 123 U. S. 727. "A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. This service inheres in every transportation." (Page 644.)

"With the foregoing statements of the carrier's duties in mind," the Commission said, "the conclusion seems inevitable that the stockyards when used to perform the service described were terminal facilities used in the transportation of property, and were freight depots, yards, or grounds used in the delivery of such property, and that the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported."

In respect of the jurisdiction of the Secretary of Agriculture under Packers & Stock Yards Act, 1921, the Commission said that the primary purpose of that act is to regulate the operations of packers, commission merchants and stockyard owners in connection with the handling of livestock consigned for sale at

primary markets, citing *Stafford* v. *Wallace*, 258 U. S. 495, 514; and pointed out that that act expressly states that its provisions shall not affect the power or jurisdiction of this Commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within the power or jurisdiction of this Commission.

The Commission found and concluded that the charges assailed in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act, and that the Commission has jurisdiction to pass upon the legality and reasonableness of such charges.

In *Strauss and Adler* v. *New York C. R. Co.*, 153 I. C. C. 609, the Commission, in considering the question of its jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, at page 618 stated:

> Bearing in mind that the two acts [Interstate Commerce Act and Packers & Stock Yards Act, 1921] should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal agencies entrusted with their enforcement, and recognizing that any doubt which may exist is by the above provision [of the Packers & Stock Yards Act that it shall not affect the power or jurisdiction of the Interstate Commerce Commission] should be resolved in favor of the authority delegated in the older of the two statutes, we

> can see nothing in the provisions of the Packers & Stock Yards Act, 1921, which in any way limits or affects the jurisdiction of this Commission previously conferred to regulate "all charges * * * for any service rendered or to be rendered in the transportation of passengers or property."

While Division 1 of the Commission had held in an earlier case, *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730, that the jurisdiction of the Commission ended when shipments of ordinary livestock are unloaded into suitable pens at public stockyards at the point of destination, and this ruling had been followed in the decision of Division 2 in the *Allied Packers* case, *supra*, the subsequent reversal by the Commission of the decision of Division 2 in the *Allied Packers* case also operated to overrule the holding of Division 1 in the *Southwestern Horse & Mule case* upon the question of jurisdication, insofar as it conflicted with the later decision of the Commission.

In a case decided even later than its decision in the *Allied Packers* case, the Commission again considered the question of its jurisdiction over yardage charges collected on ordinary livestock at public stockyards, *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, and it held that the yardage charges there assailed were not subject to its jurisdiction. This decision is not in conflict with its decision in the *Allied Packers* case nor the decision in the case at bar, but on the contrary correctly applies the principle upon which the decision in the *Allied Packers* case rests. That principle is this: The jurisdiction

of this Commission obtains as long as the interstate shipment is under transportation as defined in section 1 of the Interstate Commerce Act. Such transportation includes not merely unloading from the car but also a convenient and adequate way of the consignee to come and get his goods and take them safely from the carrier's property, *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. But where the consignee does not take such delivery and avails himself of stockyard services, then the unloading and delivery of the livestock to the stockyards company, acting as agent for the consignee, marks the end of the Commission's jurisdiction and the beginning of the jurisdiction of the Secretary of Agriculture. In the *Kahn* case the Commission, after pointing out that the stockyard company considered in that case is not owned by the carriers, said—

> And no additional charge is made when delivery is taken from the unloading pens. (192 I. C. C. 708.)

The Commission further held, and this is one of the principles underlying its decision in the case at bar:

> The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging live stock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the live stock can be so removed does the line-haul transportation cease. (Page 709.)

The recent decision of Division 3 of the Commission, in *Adolf Gobel, Inc.* v. *Baltimore & O. R. Co.*, 200 I. C. C. 606, is very similar to the Commission's decision in the *Kahn* case, and holds that the yardage charges there assailed, which were clearly for stockyards' services rather than transportation services, were not subject to the Commission's jurisdiction. The report in the *Gobel* case states—

> If complainant desired delivery at the unloading pens it could be had, but no request was made to hold livestock in the unloading pens nor did it endeavor to take delivery there.

The report in that case further shows that in each instance the stock was driven by stockyard employees to the holding pens and there held for various periods ranging up to a maximum of two days. Clearly this was stockyards service not subject to the Commission's jurisdiction.

(f) Legislative history of Packers & Stockyards Act discloses intention not to restrict jurisdiction of Commission.

In support of their argument that the yardage charges in question are subject to the jurisdiction of the Secretary of Agriculture and not the Commission's, the appellants in No. 606 quote in part (brief pp. 24–25) the statement of the Chairman of the House Committee on Agriculture [Congressman Haugen] at the time the bill which later became Packers & Stockyards Act, 1921, was under consideration. This statement was made orally upon the floor of the House, in explanation of the bill, and is here quoted in full:

It is proposed to give the Secretary of Agriculture jurisdiction over the packers, stockyards, commission men, traders, buyers, and sellers, and all activities connected with the slaughtering and marketing of live stock and live-stock products in interstate commerce; that is, the Secretary shall have jurisdiction from the time the live stock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission.

Up to the time of unloading the live stock the Interstate Commerce Commission has jurisdiction over the shipment, distribution, and ownership of stock, refrigerator cars, and other equipment, and transportation rates, including belt lines and terminal roads. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends; or, in other words, the Interstate Commerce Commission is to continue its exclusive jurisdiction over transportation rates and compelling the carriers to furnish refrigerator and stock cars, and so forth, and the Secretary is to have exclusive jurisdiction over all transactions connected with the slaughtering and marketing of live stock and live-stock products in interstate commerce, subject, of course, to court review; * * *. (Congressional Record, 67th Congress, 1st Session, Vol. 61, Part 2, Page 1800.)

The Congressman's statement as to the jurisdiction of the Commission seems correct as far as it goes, but was not necessarily intended to be a full,

detailed, complete, or exhaustive statement of the Commission's jurisdiction. It is no doubt true that ordinarily the jurisdiction of the Commission over shipments of livestock to public stockyards ends with the unloading, because in the great majority of instances such livestock is consigned to commission men doing business at the yards, utilizing stockyards' facilities and services, and upon the unloading of their stock in the yards, transportation ends. In several cases the Commission has denied its jurisdiction beyond the unloading in cases where the consignees have obtained stockyards services as distinguished from mere delivery service. *Kahn* v. *B. & O.*, 192 I. C. C. 705; *Gobel* v. *B. & O.* 200 I. C. C. 606. Apparently the Chairman of the Committee on Agriculture, in making his oral statement to the House, did not have in mind instances in which, through arrangement with the railroads, the stockyards function as the livestock terminal of the railroads, and did not have in mind at the moment the large number of authorities, including the decision of this court in the *Covington Stock Yards* case, that in such circumstances the consignee is entitled to delivery without the assessment of a special charge. Under the circumstances it seems that the Congressman's statement is not to be taken as conclusive, and as not binding upon this Court if it finds that under the provisions of the Interstate Commerce Act the Commission does have jurisdiction under the facts disclosed in the instant case.

It may be added that in the written committee report (House Report No. 77, 67th Congress, 1st Session, submitted by Mr. Haugen from the Committee on Agriculture) the only reference to the question of jurisdiction as between the Secretary of Agriculture and the Interstate Commerce Commission appears on the last page of the report (page 16), which states that section 406 of the bill, H. R. 6320, as favorably reported by the Committee,

> makes it clear that the Interstate Commerce Act [Commission] is not to be deprived of its existing jurisdiction over terminal railways in the stock yards *or over any other matter now subject to its control.* (Italics supplied.)

(g) Section 15 (5) of the Interstate Commerce Act, a remedial provision, is to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission.

Section 15 (5) contains provisions in respect to the *charges* for the transportation by railroad of carload shipments of livestock destined to or received at public stockyards. The language of the provisions indicates that it has reference primarily to charges, by providing what shall be included in the transportation without extra charge. It provides that transportion wholly by railroad of ordinary livestock, in carload lots, destined or to received at public stockyards shall include three services "without extra charge therefor to the shipper, consignee or owner," namely, (a) all necessary service of unloading and reloading en route, (b) delivery at public stockyards

of inbound shipments into suitable pens, (c) receipt and loading at such yards of outbound shipments.

There is nothing in the language that seems to narrow or restrict the Commission's jurisdiction, but on the contrary it apparently enlarges that jurisdiction to the extent that under it, in connection with section 12 requiring the Commission to execute and enforce the provisions of the Act, and section 15 (1) authorizing the Commission to remove by order any violation of the Act, the Commission has the added jurisdiction to determine in any case whether an extra charge has been imposed in violation of its provisions, and in the case of inbound shipments to public stockyards, the suitability of the pen, and otherwise enforce the provision.

The provision is remedial and would seem to be entitled to a liberal interpretation that fairly accomplishes its purpose. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72. Under it it is the duty of railroads transporting ordinary livestock destined to public stockyards to make delivery at such yards "into *suitable* pens." Under a liberal interpretation of the word "suitability" it would seem that a pen from which it is impossible for a consignee, who has gone to whatever expense and trouble may be necessary to be right there on hand at the time of the unloading of his stock, to take his shipments without extra charge, cannot be a "suitable" pen. It might have four out of five elements of suitability. It might be safe, that is, there might

be present no elements of danger, such as barbed wire. It might be bedded with straw, and it might be protected from the elements; but it would still lack one absolute essential of suitability if the person who was a party to the transportation contract and who had taken the trouble to be right there when the train came in at whatever time of day or night, could not take his stock away from the pen without the payment of extra charges. Such a pen would lack that much of being a suitable pen, and there is nothing in this provision of the Act to indicate that the Congress meant to take away from transportation the time-honored element of opportunity to accept delivery. The Commission has here held that it is not unreasonable and not a violation of any provision of the Interstate Commerce Act to assess a charge where the stock had to be put into a holding pen until the consignee came to take. But in the case of the 15 percent of the consignee's shipments as to which they have gone to the trouble to be there for the purpose of taking, and did take, transportation did not cease until that opportunity to take was extended. So long as that essential part of transportation continued, the Commission had jurisdiction and cannot escape the responsibility of acting under that jurisdiction. If it be said that, in going out from the pen into which the livestock had been driven down from the railroad car, the stock passed over runways of the Stock Yards, by necessity of the method of construction of the Stock Yards, this could not alter the law. This fact would emphasize

the view that any such pen would not be suitable if there were an extra charge made for the passage of the livestock from the pen. Furthermore, if it be said that the stockyard facilities were a convenience to the shippers and receivers of livestock, it may be said with equal force that the stockyards were a convenience to the carriers. They elected to make Union Stock Yards, Chicago, a station for the receipt and delivery of this character of freight, livestock, and published rates thereto, and if the location of consignee's plant be said to be favorable, it may be presumed the favorability of that location was reflected in the purchase price he paid for the plant. If it is a favorable location the railroads are not concerned. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

This same provision forbids the imposing of an extra charge for the receipt and loading at such stockyards of outbound shipments. How could livestock get into these pens without going over the roads or runways of the stockyards, any more than they could be taken out. If an outbound shipment were tendered at this station of the carriers, would they not have to receive and load without extra charge from these very pens?

The Commission's report says the complainant did not allege that the yardage charges in issue were unreasonable if they may be lawfully applied and relied upon section 15 (5) of the Act. The complaint specifically alleged that the yardage charges are not carried in any tariff on file with the Commission and are

consequently being collected without tariff authority (R. 20), and are therefore in violation of section 6 of the Interstate Commerce Act. It further alleged that the Yards Company operates public stockyards which are also operated as a depot of the railroads for the receipt and delivery of livestock at the station, Union Stock Yards; that such delivery is accomplished through the sidings, chutes and pens of the Yards Company, and that in accomplishing said deliveries that company is the agent of the railroads; that in respect of numerous carload shipments of livestock heretofore made complainant has directed that delivery be made to it at its own sidings and chutes, but defendant carriers have refused to make such delivery and have insisted that complainant take delivery through the chutes and pens of the Yards Company; that for these yardage charges neither the defendant carriers nor the Yards Company rendered any service over and above the necessary service in making delivery to complainant of its shipments of livestock as required by section 15 (5) of the Interstate Commerce Act; that the yardage charges purport to cover services rendered after transportation has been completed but that in fact, as applied to complainant's shipments, transportation is not completed until said livestock is delivered to complainant and placed in its control, and consequently said charges cover a portion of the interstate transportation services rendered. In view of these allegations it seems obvious the statement in the Commission's report above referred to means that the complainant did not

allege that the yardage charges are unreasonable in instances in which yardage or other stockyards' services are actually rendered—for then and then only might the yardage charges be lawfully applied. It is obvious, too, that complainant did not rely solely on section 15, paragraph 5, although under the above-suggested interpretation that paragraph alone would be sufficient, but aside from the statutory provisions relied upon by the complainant, the Commission could afford relief under any other provision of the Act which the established facts showed to be violated, *Chicago, Rock Island & Pacific Ry.* v. *United States*, 274 U. S. 29, 37.

Appellants contend that section 15 (5) had the effect of limiting the Commission's jurisdiction, that under it the Commission no longer has jurisdiction over the entire transportation service, including delivery (*Dettlebach* case, *supra*, *Prescott* case, *supra*) but that the Commission's jurisdiction ends upon the unloading in the yards. They also contend that the provision reduces their common law duty to make delivery (*Covington* case, *supra*) and that under it their common carrier obligations end upon the unloading.

In the *Allied Packers* case, *supra*, the Commission also carefully considered this jurisdictional question, and, overruling the earlier decision of Division 2 in the same case and the decision of Division 1 in the *Southwestern Horse & Mule* case, *supra*, held that section 15 (5) did not restrict its jurisdiction over

"transportation" as defined in section 1. It said, page 646:

> The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.

It held that the charges assailed insofar as they were assessed for the use of the stockyards' facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act, and that it has jurisdiction to pass upon the *legality* and *reasonableness* of such charges. (Page 647.) It was there contended, as here, that section 15 (5) is a specific enactment defining transportation insofar as movements of ordinary livestock to public stockyards is concerned, and, being a later enactment than the general provision in section 1 (3), takes precedence over it. Rejecting this contention the Commission said:

> The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general

> definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. *25 Ruling Case Law*, page 918. (*Ibid.*, 646.)

This construction seems to be correct, in view of decisions of this Court indicating that each provision of the Interstate Commerce Act must be given a reasonable construction with a view to carrying out all the provisions of the Act. In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 443, Chief Justice White pointed out that every provision of the Act must be "read in connection with the context of the Act" and that if "the general terms of the section when taken alone might sanction" a construction destructive of certain rights conferred in other parts of the Act, the context must be considered and the general terms be so construed as to give full effect to the entire Act. "The Act cannot be held to destroy itself." In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567, Mr. Justice Brandeis said that the last paragraph of section 4 when read alone might compel a certain construction but that it may not be read alone. It must be construed in the light of the purpose of its enactment, of the earlier paragraphs of section 4, and other sections in the Act to Regulate Commerce designed to prevent unjust discrimination. In *Penn-*

sylvania Co. v. *United States*, 236 U. S. 351, 366, Mr. Justice Day said that "while section 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress."

In support of their contention respecting this jurisdictional question appellants rely largely on what they assert to be the history of section 15 (5). But the history of that section indicates there was no intention to restrict the Commission's jurisdiction or to modify the common law duty of carriers to make delivery of livestock without extra charge for the mere delivery. In view of the importance of the question a full history of that provision is here given.

History of section 15 (5)

Section 15 (5) was added to the Interstate Commerce Act by section 418 of Transportation Act, 1920 (41 Stat. 484, 486). Many of the important provisions of that Act were recommended by the Commission (see its 1918 and 1919 annual reports to Congress) but the provision enacted as section 15 (5) was not among its recommendations. The original bill introduced by Congressman Esch on June 2, 1919 (H. R. 4378, 66th Cong. 1st Sess.), contained no provision bearing upon the subject matter of section 15 (5) as ultimately passed. Hearings on this bill were held before the House Committee on Interstate and Foreign Commerce during July,

August, September, and October, 1919, and it was during the course of those hearings that the subject matter was first suggested. The suggestion came from Judge S. H. Cowan, Attorney for the American National Live Stock Association and the National Live Stock Shippers' League. Judge Cowan wrote to Congressman Esch asking for permission to present the views of the associations of livestock shippers. This letter, dated July 15, 1919, appears on pages 139–140 of "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 66th Cong., 1st Sess. on H. R. 4378." With that letter was transmitted an "outline of principal propositions pertaining to legislation, which were adopted by the Executive Committee of the National Live Stock Shippers' League, Chicago, June 3, 1919." Proposal No. 6 thereof was as follows:

> 6. Propose and urge that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards used at [as] market place which shall include unloading into suitable pens and delivery therein at such stockyards, where the animals may be counted and checked, including such facilities as are necessary or in use for making such delivery.

On August 18, 1919, Judge Cowan appeared before the House Committee and testified at length in regard to the pending legislation. (Hearings, etc., *supra*, pages 845–892.) His statement in reference to proposal No. 6, above referred to, was as follows:

Taking the case of live stock and confining myself to that, there is a habit or custom of railroads to divide up the charges. The shipper is only concerned in getting his live stock from the point where he loads it to the ultimate market; that is, unloading it into the stockyards and getting it into the hands of the commission man who sells it. It is hard for him to know what ought to be the charges if they are to be segregated into a charge for this and a charge for that and the other. I think there ought to be a requirement that as to all public markets for live stock there shall be a through rate from point of origin to destination, including a delivery into the pens to the consignee or his agent; that the railroad company should have sufficient compensation for that, of course, goes without saying. About one-half cent per hundred pounds will cover the aggregate of all these special charges that are put on. In particular instances, they oftentimes become quite burdensome. You gentlemen who are familiar with it will recall that the Supreme Court of the United States a long time ago in the case of the *Covington Stockyards Co.*, held, before the enactment of the act to regulate commerce, that it was the obligation of the carrier to receive live stock and carry it to its destination and there deliver it to the consignee, and they refused to allow the special charge which was made. After the act to regulate commerce, the Federal court at Chicago—and it seems that the people are awful shifty out there—discovered that in the sixth section of the act, because it provided

there should be published all special charges, if any, that therefore they could impose a $2 charge at Chicago for reaching the stockyards which the railroad companies had built. Mind you, the railroads in Chicago went in together and built the stockyards for their own depot and convenience. They continued to own and operate them for their own convenience and for their own benefit for years. It looked like a pretty good thing as the market was building up, so they sold the stockyards, but continued the railroad managers as the board of directors. After a while, the stockyards people who had bought them thought they wanted some money, and so they added a trackage charge of 40 cents a car in and 40 cents out, to some roads and 75 cents to others; and thereupon the railroads added $2 to all live stock delivered at Chicago. Now, as a charge against the shipper, they are progressing with that.

Mr. HAMILTON. Added $2 for what?

Mr. COWAN. Added $2 to the through rate, and the Santa Fe Railroad to-day maintains that the end of its line for live-stock shipments into Chicago is at Corwith, where there is one pen, no water, grown up in weeds, and very difficult to find, the planks rotted and never used.

Mr. COOPER. Judge, does not that $2 apply to other institutions in the country outside of stockyards?

Mr. COWAN. Oh, yes. I am just speaking in behalf of live stock. I say that this idea of adding these little charges here and there

> is very pernicious and hits the shipper in the face where he can not help himself, and we ought to have to all public stockyards a flat through rate to pay for the service, because the shipper is getting just one thing. He gets his stock shipped from his farm to the place where it is sold. Whatever compensation the railroad ought to have let it have it, but let it have it for doing the one thing which to the shipper is a single proposition. He never sees any of it except it is deducted out of his account of sales.
>
> I will prepare and submit to the committee a proviso to meet that requirement, which I think ought to be enacted, * * *. (*Ibid.*, 874–875.)

Later in his testimony Judge Cowan again adverted to this subject and stated:

> Also with respect to the matter to which I have heretofore referred of one rate from point of origin to public stockyards that are denominated as terminals of the railroads, the depots, terminals, and public markets, there ought to be one rate just the same as if that stock pen actually belonged to the railroad. A railroad would not make two rates to its own pens if it owned and operated them, and neither should it do so with respect to pens which it uses in the same manner. There should be one fare, the same as a passenger rate, to such depot as they use in a given city. I will submit a brief in connection with an amendment, which I will propose which will cover that point, and I will not take your time on that. (*Ibid.*, 881.)

While the Senate bill dealing with the same subject matter (S. 3288) was under consideration, Senator Cummins, the author of the bill, on December 16, 1919, proposed the insertion of the following paragraphs as an amendment to section 15 of the Act to regulate commerce (59 Cong. Rec. 674):

> Through rates for transportation wholly by railroad shall be made for the entire ordinary transportation service from point of origin to the destination and delivery at the depots, warehouses, team tracks, or other usual unloading places; and in case of ordinary live stock destined to be received at public stockyards, to include the service of unloading and delivery of inbound shipment into suitable pens, and receipt and loading of outbound shipments; such to be deemed the carriers' facilities. This provision shall likewise apply to other than ordinary live stock destined to or received from such stockyards handled in the same manner, provided that where by reason of the extraordinary value of the animals or their condition, it is reasonably necessary for their proper care and handling, such additional service as is reasonably necessary in properly caring for the same, the unloading and delivery or loading thereof may be required by the carrier of the shipper, which, if not furnished by him, shall be furnished by the carrier and reasonable charge made therefor against the shipper—all of which shall be carried in tariffs and subject to the determination of the Commission.
>
> Public stockyards are those used as facilities for handling live stock at places of sale, pur-

chase and slaughtering, including those at which the Department of Agriculture maintains inspection of meat animals for slaughter, and such other places as the Commission may find in common use for handling or buying and selling live stock by carloads, to be designated by the Commission.[6]

Thereupon Senator Cummins stated the reasons for the amendment, as follows (59 Cong. Rec. 674):

Mr. CUMMINS. Mr. President, this proposed amendment has been brought to my attention by the American National Live Stock Association, of which Judge Cowan, of Fort Worth, is the general counsel.

The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a live-stock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a series of charges for various services performed in connection with the transportation of the livestock, so that the shipper

[6] There were a number of prints and reprints of several bills. H. R. 10453, as amended in the Senate, struck out all after the enacting clause and substituted an entirely new bill. The above-quoted amendment, proposed by Senator Cummins, appeared in the reprint of December 20, 1919, of H. R. 10453, as the fifth and sixth paragraphs of a proposed amendment to section 15 of the Act to Regulate Commerce pages 179–180.

does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it.

I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car. I think it is an amendment which will tend toward the protection of those who have occasion to use the railroads in the shipment especially of live stock.

The amendment was agreed to. (*Ibid.*)

February 21, 1920, the conference report on the bill was read in the House. In conjunction with their report the House managers made the following statement (59 Cong. Rec. 3264):

Transportation of Live Stock—

(Section 418 of the conference bill.)

Section 44 of the Senate amendment provided that through rates on live stock should include *unloading and other incidental charges* in the case of shipments consigned to public stockyards. The House bill contained no reference to this matter. The conference bill *amplifies* the provision of the Senate amendment and provides that "transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of un-

> loading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge to the shipper," with certain exceptions concerning which the commission may prescribe rules. (Italics supplied.)

As so amplified the provision was agreed to by both Houses and enacted as paragraph numbered 5 of section 15.

It thus appears the provision was not intended to be directed solely to loading and unloading charges but was much broader in its scope and embraced all extra charges of whatever nature in addition to the published tariff rate.

Nor was there any thought of restricting the Commission's jurisdiction, but the purpose was to remedy by specific statutory enactment a practice regarded as an evil. It was the intention, clearly expressed by the author of the provision, "to bring the whole subject within the jurisdiction of the Interstate Commerce Commission." Nor was there any thought or purpose of limiting the common carrier obligations of the railroads so that they would end upon the unloading of the stock into suitable pens. The decision of this Court in the *Covington Stock Yards* case, holding that it was the obligation of the carrier to receive livestock and carry it to its destination and there deliver it to the consignee without an extra charge, was called to the attention of the lawmakers, and the purpose of the enactment was to enforce the principle of that decision

rather than reduce the common-carrier obligations as there expounded.

It is true of course that in the great majority of instances the transportation of livestock to public stockyards does end upon the unloading of the animals into suitable pens, because the great bulk of livestock shipments to public stockyards are intended for commission men and traders doing business in the yards. In such instances a stockyards' service is furnished and when that is so the common-carrier transportation, and consequently the jurisdiction of this Commission, ends upon the unloading and thereupon the jurisdiction of the Secretary of Agriculture under the Packers & Stock Yards Act begins. The decision of the Supreme Court of Missouri in *Burton* v. *Wabash Ry. Co.*, 58 S. W. (2d) 443, so holds, the livestock shipments there involved, transported from a point in Missouri to the public stockyards at East St. Louis, Ill., having been consigned to a commission merchant doing business at the stockyards. But it is shown by the decision of this Court in the *Covington* case, by the decisions of the Commission in the *Allied Packers* case, in the *Kahn* case, in the *Gobel* case, and in the case at bar, that public stockyards frequently function in another capacity, and that is as a place of receipt and delivery, a livestock depot, for the railroads; and under the above decisions where the consignee seeks no stockyards' services but takes delivery at the time of unloading of the animals from the car and drives them directly out of the yards, no extra charge may be made for that privilege. There is nothing in the

language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stock Yards Act, and nothing in the legislative history of that Act to indicate an intention to relieve common carriers from their time-honored duty of making delivery of livestock without extra charge through their established livestock terminal, whether owned by themselves or hired from somebody else.

II

The Commission's finding that the Union Stock Yards at Chicago are the livestock terminal of all line-haul carriers transporting livestock to Chicago is supported by precedent and by substantial evidence of record in the present proceeding

In previous cases the Commission has had occasion to deal with the status of the Chicago Union Stock Yards and with their relation to the Chicago Junction Railway and the line-haul carriers engaged in the transportation of livestock to Chicago. In *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 224, it found:

> The Chicago Stock Yards are the terminals for the receipt and delivery of livestock of the railroads utilizing them.

This finding was based upon the following subordinate findings of fact, among others:

> * * * A very large proportion, said to be as high as 98 per cent of the stock shipped to Chicago, is consigned to persons at the stockyards. None of the line-haul carriers reaches the Chicago stockyards with its own rails, but all utilize the tracks of the Chicago

> Junction Railway, for which they pay a trackage charge as published in the tariff of the latter company.
>
> * * * * * * * * These stockyards, however, are in fact a terminal for the receipt and delivery of livestock; that is one of the purposes for which they were created and one of the uses to which they are now put. The situation appears to be exactly the same as it would be were the stockyards outside the city limits of Chicago. The stockyards must be the terminal for the receipt and delivery of livestock of the railroad utilizing them. (*Ibid.* 219–220.)

In a subsequent report in the same proceeding, 58 I. C. C. 164, the Commission held:

> Standing alone the stockyards could not be readily availed of by shippers. Were it not for the tracks of the Junction Company [Chicago Junction Railway Company] delivery of cattle in carloads would not be possible. It requires the line-haul carriers, the Junction Company, and the stockyard company to make the stock yards an effective agency of interstate commerce. Under this state of facts we are of opinion and find that the stock yards are in effect terminals of the line-haul carriers, the Junction Company, and the stockyard company. (*Ibid.*, 167–168.)

This finding was sustained in *Adams* v. *Mills*, 286 U. S. 397, 409 in which the Court said:

> The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice.

> The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. *That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so.*. (Italics supplied.)

The finding in the case at bar, which is the same as the former finding so made and sustained by this Court, that the Union Stock Yards are the livestock terminal of the livestock carriers reaching Chicago, is fully supported by the evidence submitted to the Commission in this case.

(a) The fact that the Stock Yards have been used uninterruptedly since their creation in 1865 as the established place of delivery of livestock in Chicago, of all railroads reaching that city, shows they are the livestock terminal of all those carriers

O. T. Henkle, Vice President of the Stock Yards Company, testified (R. 147) that a history of that Company is given in the decision in *United States* v. *Union Stock Yards*, 226 U. S. 286, and in the report of the Commission in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209. This report points out that "Prior to 1865 there were four different points in the City of Chicago at which livestock was delivered and marketed"; that "in that year the railroads then entering Chicago organized a company to be known as the Union Stock Yards & Transit Company," the stock in which was "very largely taken by the Chicago railroads." The Company "was created by a special act of the

legislature of the State of Illinois, approved February 13, 1865," with authority (a) "to construct the necessary buildings, railway tracks and loading and unloading platforms for the accommodation of the business of a general Union Stock Yard for cattle and other livestock"; (b) "to construct, maintain and operate a railway from the grounds that might be selected for its yards so as to connect with the tracks of all the railroads which terminated at Chicago." (*Ibid.*, 210–211.)

This initial history shows plainly that the Stock Yards Company was organized by the railroads for the purpose of creating one centralized place of delivery and marketing of livestock in the City of Chicago, to take the place of the several livestock terminals and markets theretofore existing—the creation of what may fairly be characterized as a "union depot" for livestock.

The charter itself is of record in the proceeding at bar, a certified copy of it having been introduced before the Commission as Exhibit No. 20.[6] Pertinent provisions of it are quoted in the *Union Stock Yards case*, 226 U. S. 296–297, and these provisions show clearly that the company was organized not only to locate, construct and maintain near what were then the southerly limits of the City of Chicago all the necessary yards, enclosures, buildings, structures,

[6] Exhibit #20 is a photographic copy of the original in script. Exhibit #21 is an exact typewritten copy (R. 146-147), and is before the Court, pages 10–26, of separate bound volume of Original Exhibits.

etc., for the accommodation of the business of a general union stock yard for cattle and livestock, but also to construct a railway from the yards "so as to connect, outside of the City of Chicago, the same with the tracks of all the railroads which terminate in Chicago * * * and to make connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; * * * and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and livestock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, * * * freight and property of every kind as well as stock and cattle. * * *"

The court found that after its creation the Stock Yards Company acquired real estate, constructed and operated stock yards, with a stock market, and "constructed in the stock yards district about 300 miles of railroad track consisting of main lines connecting with the trunk lines entering Chicago and a large number of switches to the various industries which had been

established adjacent to such tracks." (226 U. S. 297–298.)

Having been thus created in 1865 as a livestock market, and as the livestock terminal of all railroads entering Chicago, the stockyards have been used as such continuously and uninterruptedly since that date. The record shows that all of the large Chicago packers as well as many small ones are located upon the rails of the Chicago Junction Railway, with but a single exception. (R. 166, 172, 182.) The exception is that of the Omaha Packing Company, located about 2½ miles north of the Stock Yards, on the rails of the Burlington. (R. 182.) With this exception practically all of the Chicago packers are located in what is called "Packing Town", which is the territory embracing the Chicago Stock Yards and its immediate environs. All are located upon and are served exclusively by the Chicago Junction. With this factual background the Commission's finding in the case at bar that

> No sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction

acquires additional significance. All have private sidetracks running into and serving their plants, but livestock is not delivered on any of those sidetracks. (R. 162, 166–167, 172.) It is delivered upon and through the unloading platforms, chutes and pens of the Stock Yards Company, which has functioned since its creation as the established livestock terminal of all Chicago railroads. (R. 149, 153–154, 156, 166.)

There is the one exception in the case of the Burlington which serves the plant of the Omaha Packing Company. That industry receives no shipments and buys no livestock through or at the Union Stock Yards. All livestock received by it by rail are placed upon its private sidetracks by the Burlington. (T. 182.) The Commission found that—

> No carrier other than the Burlington delivers or places carload shipments of livestock at any private industry.

In other words, with this single exception all the trunk-line carriers reaching Chicago make deliveries of livestock at and through the Union Stock Yards. While the record shows that some of the western lines have pens at outlying places within the Chicago Switching District, the record fails to show that a single car of livestock has at any time been delivered to Chicago consignees at those outlying yards.

(b) The trackage rights of the various carriers over the Chicago Junction Railway to Union Stock Yards, their publication of rates to the Yards, the fact that they maintain an agent there and other facts show that Union Stock Yards is a station on their lines

It was testified by complainant's principal witness, and not denied by the carriers, that the Union Stock Yards "is a sub-station of Chicago." (R. 110.) Since it is an undisputed fact, as found by the Commission, that each of the individual line-haul carriers transporting livestock to Chicago have trackage rights over the Chicago Junction, it follows that the rails of that company are actually, as well as legally, part of the railroad of each of the line-haul carriers. For

section 1 (3) of the Interstate Commerce Act provides that—

> The term "railroad" as used in this Act shall include * * * all the road *in use* by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, * * *.

Cf. *Transit Commission* v. *U. S.*, 289 U. S. 121; *C. & A. R. Co.* v. *T., P. & W. Ry. Co.*, 146 I. C. C. 171.

The station Union Stock Yards is a station of each of the line-haul railroads; and they maintain an agent there—see Ex. 14, "Original Exhibits", page 9, a reproduction of a letter written by that agent, showing on the letter-head the various railroads, 23 in number, of which he is general agent at "Union Stock Yards, Chicago," and see his testimony (R. 160) that he is "general agent of the railroads at the Union Stock Yards."

The fact that the Union Stock Yards is a station of each of these trunk-line carriers is further demonstrated by the fact that each of them pays the Yards Company for loading and unloading shipments of livestock at Union Stock Yards.

It is clear, too, that all these line-haul carriers publish rates to this station (R. 106, 110–113, 178); and it is significant that these rates are in all instances higher than the rates generally applicable to other delivery stations within the Chicago Switching District. With but few exceptions the "Chicago" rate is applicable to all deliveries within the district but

on livestock to the Union Stock Yards the rate is the "Chicago" rate *plus* $2.70 per car and $1.35 per car on shipments from the West and East, respectively. (R. 110–111, 179.)

Conceding that the line-haul carriers publish rates on livestock to the "industries, chutes or sidings" of the Union Stock Yards, counsel argue that these tariffs limit their duty to transporting the livestock to those places and that they are under no duty to make delivery there without an extra charge to the consignee for the privilege of taking his livestock out of the yards. But these tariffs are no different from any others which specify, as required by section 6 of the Act, the "places between which property * * * will be carried." When the property reaches the place of destination, in this case the industries, chutes or sidings of the Union Stock Yards, the carriers are under the duty to make delivery and under the authorities hereinbefore cited they may not lawfully assess an extra charge against the consignee for the use of their facilities in removing his property from the terminal.

(c) The Chicago Union Stock Yards are necessarily the carriers' livestock terminal because the great volume of the livestock traffic to and from Chicago could not practically, conveniently, and economically be handled by any other facilities in that city

The volume of the traffic is shown by the testimony that in the year 1930, 23 railroads brought into the stockyards 204,828 cars containing more than 14,000,000 animals. (R. 149.) The outbound traffic was 48,501 cars. (R. 149.) Practically all of these

cars were brought in in trainloads, many of the trains containing as many as 70 cars. (R. 149.) It was testified in behalf of the Stock Yards Company that to perform all the services at the stockyards it is necessary to maintain an organization and facilities which are very complete. (R. 153.) "The organization must be prepared to function at all hours and must always be maintained at a point which will enable it to take care of the maximum amount of business. Handling stock in this fashion, both as to loading and unloading service and the yards service, is the only thing that renders practical the receipt, sale and delivery in the Chicago market of the animals that are handled there daily. The Chicago market is now and for many years has been the largest and most important livestock market in the world. *It has reached this development only because livestock deliveries are concentrated* * * *." (Witness Henkle, Vice President Stock Yards Company, R. 153.)

Witness Henkle further testified that "as a result of the methods of handling livestock which have obtained in Chicago for the last 50 years, an essential speed in handling the traffic has been developed. This speed is necessary if congestion and delays are to be avoided. It permits the handling of livestock in trainload lots, which could not possibly be done if deliveries were scattered. It permits the making of necessary records without delay or damage to the stock itself and has proven eminently satisfactory to everybody and must be conceded to be the only

practical method of taking care of the volume of livestock traffic which moves to and from Chicago every day. The system of handling has been developed over a long period of years. The entire structure would be torn down by any requirement that livestock deliveries in the congested areas of the Chicago Yards should be made in any other fashion. (R. 156.)

(d) The failure and refusal of the carriers to make delivery to complainant upon the sidetracks in complainant's plant of shipments of livestock consigned to complainant, and the actual delivery of all such shipments at the Union Stock Yards, corroborates other evidence showing that those yards are their public livestock terminal in Chicago

Delivery of all inbound shipments of carload freight *other than livestock* is made upon complainant's tracks by the Chicago Junction, and the rate applicable is the "flat" Chicago rate, the switching charge of the Chicago Junction being absorbed by the line-haul carrier. (R. 103–104; Exs. 6, 7 and 8.) But all inbound shipments of livestock consigned to complainant were taken by the line-haul carriers into the unloading platforms in the Union Stock Yards and in order to get its livestock out of the Yards it was compelled to pay the yardage charges even though it took delivery at the unloading pens *and all it wanted was delivery of its stock*. (R. 138.)

Shortly after complainant acquired its Chicago plant in 1929, it sought to secure delivery of its shipments of livestock upon the sidetracks in its plant. Most of its livestock moves over the Chicago & North Western, and it endeavored to arrange with

that carrier for such sidetrack delivery but was unsuccessful. (R. 115.) In September, 1930, it instructed the shippers to consign the livestock to it at Chicago, for delivery by the Chicago Junction Railway, and to place a notation upon the bill of lading indicating that the shipment was not to go into the Union Stock Yards at Chicago. (R. 113–114.) Exhibit No. 12 ("Original Exhibits", p. 7) is a typical bill of lading of this character. It is dated Sioux Falls, S. Dak., September 29, 1930, and covers three carloads of hogs consigned to complainant at Chicago for Chicago Junction Railway delivery, with notation thereon "Do not go into U. S. Yds. Chgo." None of these cars was placed on complainant's siding but all were taken directly to the Union Stock Yards and unloaded and placed in the pens there. That was done without complainant's authorization or consent. Complainant was notified it could get the stock or leave it. (R. 114.) The stock was unloaded by the Yards Company at its platform where it had been taken by the line-haul carrier. After the livestock had been unloaded without complainant's consent, it removed them from the stockyards and brought them to its plant. Complainant eventually paid the yardage charges on this livestock. In paying the bills as rendered in the first place [7] it eliminated the yardage charge but the Stock Yard Company notified com-

[7] These bills included the freight charges, as well as the yardage and other charges. See R. 106, 150; and Ex. 11, a typical bill (Original Exhibits, p. 6).

plainant that it would hold current shipments of complainant's stock in the yards until the earlier bills for yardage charges were paid. (R. 114.) So, under compulsion, complainant paid the charges. It thereafter made no further attempt to secure delivery at its plant, aside from having its livestock contracts name it as the consignee (R. 114), these efforts being abandoned because they appeared to be futile (R. 115). Complainant was never given delivery on its private sidetracks of any of its shipments of livestock, either before or after the above instances. (R. 115.)

Various reasons and excuses were given by the carriers for failure to make this sidetrack delivery (see R. 115–116; 122–126; 130; 161; 176–177), but the testimony in this regard read as a whole demonstrates that the carriers were unwilling to establish the precedent of sidetrack delivery to any packer in the stockyards district. They were unwilling to do so because if one packer obtained such delivery, other packers would want it, and confusion, congestion and delay would result, as fully explained by witnesses for the defendants. (See testimony of William J. O'Brien, General Manager, Chicago Junction Ry., R. 162–174; J. A. Behrle, Assistant Freight Traffic Manager, Alton Railroad, R. 180–181; O. T. Henkle, Vice President and General Manager, Union Stock Yards & Transit Co., R. 149–150, 153–154, 156. See also testimony of witness Benjamin B. Greer, R. 140–144.)

While the Commission's report finds that "there are *now* no facilities there for the unloading of livestock and no scales for weighing," it is important to note that *at the time* the demands were made by complainant for delivery at its plant, it had on hand facilities which permitted such delivery, and the carriers' refusal to make delivery there was not because of absence of such facilities. (See R. 99–102; 119–120.)

(e) That the Union Stock Yards are the railroad livestock terminals in Chicago is further shown by the unwillingness of the carriers to change the present practices under which the great volume of the livestock traffic is now delivered through one centralized depot, without confusion, congestion, or delay

The general manager of the Chicago Junction explained that to deliver at complainant's plant shipments of livestock consigned to it would be awkward, fruitful of delay and more expensive than the ordinary handling of the business. (R. 162.) Today the trains are hauled by the engines of the trunk lines direct to the unloading platforms of the Stock Yards Company, the crews and engines remain with the trains, and after unloading the cars are moved out to their own terminals, which "provides a very expeditious method of handling the heavy run of livestock." (R. 162.) This method has been followed ever since the stockyards were constructed in 1865. (R. 162.) If the method of making individual sidetrack delivery to consignees were employed "it would mean special arrangements which I will have to visualize, *it never actually having occurred.*" It would mean the sepa-

ration, the switching out of these particular cars of stock; in the home terminals of the trunk lines bringing in the stock to Chicago. This could not be permitted to occur on the tracks or in the yards or terminals of the Chicago Junction, because of the congestion and delay that would result. (R. 162–163.) It would not be possible for the trunk-line trains to stop at some junction yard in Chicago before they got to the stockyards, and set out the cars for the Hygrade Company, because of the congestion and delay that would result. "Ordinarily," it was testified "these trains move direct to the unloading platforms, and almost every day or every night you will find one train following another, where there are anywhere from 1,000 to 2,000 cars of stock moving; and to stop these trains to do any switching would be very detrimental; it would tie up the main thoroughfare used by these trains, and diverting them into any special yards for that purpose would be impossible because we have no yard that could be devoted to that purpose." (R. 163.) When such a train stops on the Chicago Junction's main track it necessarily delays everything behind it; and it is very congested in the Stock Yards district—"on the nights when the stock runs are heavy, we have a very heavy movement of traffic over our rails." (R. 163.) There is no district within the Chicago area that is as congested as the Stock Yards district and no place in Chicago where there are so many foreign line crews moving over the tracks of any other company. (R. 163.) When business is normal there are often as high as 200 for-

eign engines on the Chicago Junction's rails in the course of a 24-hour period. (R. 163.)

In many cases under the requirements of the confinement law [8] the animals must be unloaded within a certain specified time, requiring that delivery be expedited. This is the reason, the witness explained, why it is hurried to the Union Stock Yards. (R. 165.)

The witness testified that there are about 25 other packing plants located immediately around the Stock Yards in practically the same position as the Hygrade plant, and while some of them are small, others are the largest in the world. (R. 166.) It would be very difficult to make direct delivery to these various plants. (R. 166.)

There was considerable additional testimony on this subject (see R. 166–171; also 142–143, 180–181), but what has been referred to above is sufficient to show that the Union Stock Yards are in effect and in fact the livestock terminal of the Chicago railroads. They are necessarily so because of impracticability if not the impossibility of properly delivering the great volume of the traffic through any other facilities now existing in Chicago.

[8] Popularly known as the 28-hour law, approved June 29, 1906, c. 3954, 34 Stat. 607, U. S. Code, Tit. 45, c. 4, secs. 71–74, which prohibits the confinement of livestock in interstate transportation in a railway car or other vehicle for a longer period than 28 consecutive hours, with certain exceptions, without unloading into properly equipped pens for rest, water, and food. One of the exceptions is that upon the written request of the owner, the time of confinement may be extended to 36 hours. Cf. *Strauss & Adler* v. *New York C. R. Co.*, 153 I. C. C. 609 and 188 I. C. C. 487.

III

The existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant is impractical, does not affect the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge, at the carriers' established livestock terminal, the Union Stock Yards

Appellants contend, in substance, that all of them have escaped their duty to make delivery at their established livestock terminal in Chicago, the Union Stock Yards, because some of them have provided pens at outlying points where delivery could be taken without the assessment of yardage or other charges in addition to the line-haul rate to Chicago. There is some evidence in the record about certain outlying stock pens, but it is very fragmentary. The only oral testimony in the record on the subject is the testimony on cross examination of complainant's traffic manager, which is reproduced verbatim in the record. (R. 121–122.)

In addition to the above oral testimony there was reference to the tariffs of certain railroads which concurred in Agent Galligan's tariff I. C. C. No. 182 (R. 112–113), this testimony having been put in to show that Union Stock Yards is a railroad station in the Chicago district, i. e., a substation of Chicago. Some of these tariffs referred to certain outlying stock pens, but there is no evidence whatsoever in the record to show the adequacy, accessibility or suitability of these pens, and there is no finding in the

Commission's report in these respects.[9] The question in issue here is not "a pure question of law to be determined by merely reading the tariffs." Compare *Adams* v. *Mills*, 286 U. S. 397, 409. Reference to the tariff provisions referred to will show, however, that their principal purpose is to make certain that an extra charge in addition to the Chicago line-haul rate applies when those railroads transport livestock shipments to Union Stock Yards in Chicago, viz., the aforementioned terminal charge of $2.70 or $1.35 in addition to the line-haul rate. To the extent that any of them indicate that the Union Stock Yards is not a station on their lines in Chicago they are in direct conflict with the evidence and the Commission's findings in this case which show that the Union Stock Yards are a station on their lines to which they transport livestock in great volume with their own locomotives and crews over the rails of the Chicago Junction Railway under trackage rights.

Upon the strength of the above evidence the Commission made the statement in its report that "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is imprac-

[9] The fact that there is no finding in this respect in the case at bar distinguishes it from the earlier decision of Division 1 of the Commission in the *Southwestern Horse & Mule case*, 129 I. C. C. 730. There it was found that the individual pens and other stock yard facilities maintained at Fort Worth by the line-haul carriers were "accessible to and adequate for the traffic under consideration." (Page 735.) That case was different from the present one in several other respects.

tical." But the Commission concluded, found and held that the *livestock terminal* at Chicago of the individual line-haul carriers transporting livestock to Chicago is the Union Stock Yards; that these yards provide for the carriers the means of making the deliveries of livestock to consignees at these public yards *which they are under obligation to make*, and that since there are no services performed after unloading there for which the defendants may assess charges in instances where delivery is taken at the unloading pens, no extra charge may be made, and the fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason for an extra charge at the Union Stock Yards.

This determination is not purely one of law; it is the determination of an administrative question, i. e., the lawfulness of the practice under which there was imposed an extra charge upon the shipper for the privilege of removing his livestock shipments from the yards. A showing that the carrier's duty, to make delivery of livestock at its terminals without extra charge for the mere delivery, is fulfilled at some of its stations, in this case the alleged outlying pens, does not relieve the carrier from performing the duty at Union Stock Yards, its established livestock terminal in Chicago.

IV

The order is adequately supported by essential quasi-jurisdictional and other findings

It is argued that the order is void on the alleged ground that the findings are inadequate in several respects.

(*a*) Particular stress is laid on the asserted lack of finding of a violation of any provision of the law. This overlooks the findings (a) that the extra charges in question, applied in connection with the transportation of interstate shipments, were not published in tariffs filed with the Commission; (b) that no services were performed after the unloading in instances in which the consignee took delivery at the unloading pens, for which defendants might assess charges; (c) that in such instances carload shipments of livestock consigned to complainant at the Union Stock Yards are not subject to yardage charges; (d) that such charges in those circumstances are "inapplicable."

The finding of the section 6 violation alone was sufficient to support the order. The underlying purpose and aim of the Act to Regulate Commerce was the prevention of discrimination, *Shreveport* case, 234 U. S. 342, 356, and to that end the duty was imposed of establishing and publishing schedules of rates and charges, and strictly adhering to them, *Abilene* case, 204 U. S. 426, 437, *Mottley* case, 219 U. S. 467, the tariff, so long as it was of force to be treated in this respect as though it were a statute, binding as such upon railroad and shipper alike, *International Coal* case, 230 U. S. 184, 197. "The chief purpose of the

Act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed." *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 576, 597. "The purpose of the Act to Regulate Interstate Commerce, frequently declared in the decisions of this Court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure." *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U. S. 577.

Where there is a departure from the tariffs published and filed as required by section 6 of the Act, discrimination is presumed as a matter of law, as in *C. & A. R. Co.* v. *Kirby*, 225 U. S. 155, *Davis* v. *Cornwell*, 264 U. S. 560, and *C. & O. Ry. Co.* v. *Westinghouse, etc.*, 270 U. S. 260, in each of which there was such a departure.

In *Davis* v. *Cornwell*, the Court said:

> *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal when not provided

> for in the tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shippers, as much as a contract to expedite the cars when loaded. *It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference.* The objection is not only lack of authority in the station agent. The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery. (Italics supplied.)

Under these cases, therefore, it is to be presumed as a matter of law, that the departure from section 6, found by the Commission in this case, resulted in undue preference and discrimination.

The fact that the yardage charges were named in tariffs on file with the Secretary of Agriculture could not cure this violation of section 6 of the Commerce Act, nor satisfy the purpose of that section. First, that tariff could have no lawful application to *transportation* or any part thereof. It was a stockyards tariff, naming only stockyards' charges. Second, it was not filed with the Commission, where all rates and charges applicable to interstate transportation are required to be filed, as part of the scheme of giving them publicity, where they are open to inspection, and where the shipping public may come to determine from such officially filed tariffs the full amount of rates

and charges applicable to interstate transportation. Third, it was not posted at railroad stations, as is also required by section 6 as a further part of the regulatory scheme of giving publicity to the rates, and where a shipper from that station may examine the tariffs and determine from them the full and exact amount which he is required to pay for his transportation, and also what his competitor must pay. See *U. S.* v. *C. & A.*, 148 F. 646, 156 F. 558, 212 U. S. 563. Nor would the filing with the Secretary of Agriculture prevent the discrimination which the Interstate Commerce Act was intended to prevent, for the charges in question could be assessed in connection with the transportation of some shipments and not others, with impunity, because, if there were a prosecution for a violation of the Packers & Stock Yards Act on the alleged ground of a deviation from the stockyards' tariff, it could be shown that the charges were assessed in connection with the interstate transportation and the delivery thereof, to which the Packers & Stockyards Act has no application.[10]

But, as previously stated, the Commission did not rest its decision solely upon the violation of section 6, but proceeded to determine whether there was any

[10] Packers & Stockyards Act does not require the Yards Company to collect its yardage charges in instances where the Yards Company functions not as a stockyards but as a railroad livestock depot, and where it performs no yardage service but merely permits the consignee to use its ways to drive the stock out of the yards as a necessary part of the delivery of the interstate shipments. Hence the Yards Company will not violate Packers & Stockyards Act by obeying the order in question, as alleged by appellants in No. 606.

service performed for which a reasonable charge might be made and found, as stated, that there were no such services, the carrier not being entitled to assess an extra charge against the consignee for the mere privilege of taking his shipments out of the carrier's terminal.

It follows that the Commission here made the quasi-jurisdictional findings essential to the constitutional or statutory validity of the order. (*United States* v. *B. & O. R. Co:, Power Reverse Gear* case, decided January 7, 1935.) Having found that the extra charges were imposed in violation of section 6, and further, that aside from that violation, no services were rendered for which an extra charge could be made, it then was authorized and required to exercise the jurisdiction conferred upon it by section 15 (1) and make an order directing the removal of the practice.

(b) It is asserted that there was no finding by the Commission that the "practice" condemned by it was unreasonable. But the Commission found that the practice was *ipso facto* unlawful because under it charges were collected in connection with the delivery of interstate shipments that were not published, posted, and filed as required by section 6 and for which no services were performed for which extra charges in addition to the established tariff rates and charges might lawfully be assessed. It seems there could be no question as to the unreasonableness of a practice found to be unlawful. Cf. *A., T. & S. F. Ry. Co.* v. *U. S.*, 279 U. S. 768, 773, in which the Court held that "to make an additional charge for

having brought merchandise into a city if it should afterwards be shipped out, is *on its face* unreasonable." Thus the court below was well justified in regarding the practice in question as an unreasonable one. Its finding, however, was that the practice was unlawful. Its opinion states (R. 59–60):

> It was an unlawful practice for the Yards Company as well as the complainants [the railroads who were petitioners before the court] to thus assess and make charges in addition to the prescribed transportation rates.

The Court further held that "The Interstate Commerce Commission, by virtue of sections 13 (1) and 15 (1) of the Interstate Commerce Act, has been given jurisdiction over unreasonable practices of carriers engaged in interstate transportation," and that "This has application to the order entered herein, for the movement of livestock into unloading pens constitutes a part of their transportation; it is but the delivery of the consignee's shipment." (R. 57.) The provisions of section 15 (1) are even broader. They give the Commission jurisdiction over practices of the carriers which are violative of any provision of the Interstate Commerce Act.

(c) It is said that one of the issues presented to the Commission for determination was "whether any of appellants' rates or practices were unreasonable or otherwise in violation of the law." (Brief in No. 606, p. 66.) We refer to this statement only to point out that there was no issue in the Commission proceeding as to whether any of appellants' *line-*

haul rates were unreasonable or otherwise unlawful. The Commission passed upon all the issues in the case to the extent necessary, granting complainant relief in those circumstances where it found that relief was due.

(d) Respecting the alleged failure of the Commission to determine the rights and obligations of appellants under section 15 (5): The Commission, after quoting the pertinent provisions of this paragraph (R. 27), said:

> Under this provision of the act which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock.

It is manifest the Commission did not regard this provision as depriving it of jurisdiction over the complaint, for otherwise it would have dismissed the complaint for lack of jurisdiction, as in the *Kahn* case, 192 I. C. C. 705, and the *Gobel* case, 200 I. C. C. 606, in both of which cases it held that the yardage charges were imposed after tranportation had ended and were therefore beyond the Commission's jurisdiction.[11]

[11] Mandamus proceedings were instituted in the Supreme Court of the District of Columbia in the *Kahn* case. That Court refused the writ. Its decision was affirmed by the Court of Appeals for the District. *United States ex rel.* v. *Interstate Commerce Commission*, 73 Fed. (2d) 948. Certiorari was denied by this Court January 11, 1935, *United States ex rel the Kroger Grocery & Baking Co.* v. *Interstate Commerce Commission*, No. 622, October Term, 1934.

Moreover, the Commission had recently given thorough consideration to the question of its jurisdiction over shipments of livestock consigned for delivery at public stockyards and the application of section 15 (5) in such circumstances, in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641 (1930), which has been hereinbefore reviewed. Appellants' contention here amounts to no more than a complaint because the Commission did not repeat in its report in this case discussions in earlier reports on the same questions of law. This is also true in respect of the alleged lack of a finding on the question of jurisdiction as between the Commission and the Secretary of Agriculture over the yardage charges in question. The report clearly finds that these yardage charges were assessed in connection with the *transportation* of the shipments in question. This being true it would follow that the Commission has the jurisdiction which it here exercised. There was no lack of an essential finding on this subject.

(e) Regarding the question whether the Yards Company was acting in its own behalf or as agent of the railroads in collecting the yardage charges: The report finds that the Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all these carriers. "They provide for the

carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make." (R. 26.) This seems indisputably to be a finding of agency on the part of the Union Stock Yards in the delivery of livestock for the railroads. The effect of the Commission's order is that the charges it condemns shall not be imposed, whether the Yards Company collected them in its own behalf or as agent for the railroads.

(f) Whether the Stock Yards Company is still a common carrier is immaterial in view of the finding that it functioned as agent of the railroads in connection with the delivery of the shipments in question. This is more fully covered in section VII, *infra*, of this brief.

(a) The order is not lacking in definiteness and certainty

The order requires the accomplishment of a result, namely, that there be a cessation of the practice which subjects complainant to the payment of yardage charges on livestock, in carloads, consigned to complainant at the carriers' public terminal at Chicago for delivery of such freight, in instances where delivery is taken at the unloading pens provided for that purpose. Conceivably there are several ways in which this result may be accomplished, but the order leaves it to the discretion of the management of the defendants as to the manner in which they will accomplish it. In this respect the order is not unlike orders in which the Commission requires the removal of discrimination without specifying the manner in which

it shall be removed. Such was the order in *Chicago, I. & L. Ry.* v. *United States*, 270 U. S. 287, which required several carriers to remove discrimination against another carrier (the South Shore) resulting from their refusal to make switching arrangements with it such as existed among themselves. The Court, after holding that the order did not require the steam railroads to extend any service to the South Shore, said "it leaves them free to remove the discrimination by any appropriate action." The order here under consideration leaves the carriers free to comply with its terms by any appropriate action.

The Commission's report refers to the definition of the term "transportation" in section 1 of the Interstate Commerce Act (R. 27), and discusses what constitutes delivery, citing and quoting from the decision of Mr. Justice Harlan in the *Covington* case on this subject, and it seems impossible to read the Commission's report and order without perceiving that the Commission did determine that at the time of the alleged yardage the delivery to which the consignee was entitled had not been made, and that therefore the livestock in question were still a part of transportation within the Act's definition. The determination as to the point and under what circumstances the interstate transportation of livestock to public stockyards terminates had previously been made in the *Covington* case, from which the Commission quoted:

> The transportation of livestock begins with their delivery to the carrier to be loaded upon

> its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

The Commission was not concerned with the Yards Company in its capacity as an operator of stockyards. It was concerned with that company only in its capacity as agent for the railroads in furnishing terminal facilities for the receipt and delivery of livestock at Chicago, in unloading interstate shipments of livestock, notifying the consignees, collecting the freight charges, and other services connected with the delivery of such interstate transportation. As a stockyards, it is one thing, and in that capacity is subject to the jurisdiction of the Secretary of Agriculture insofar as the Packers & Stock Yards Act applies. In its capacity as a provider of an instrumentality necessary in connection with interstate transportation by railroad, and as such subject to the provisions of the Interstate Commerce Act, either directly or through the railroads, it must comply with the Commission's order, if valid. Under such order it may not collect yardage charges in the circumstances stated in the order; and the fact that, in compliance with the Packers & Stock Yards Act, it has on file with the Secretary of Agriculture a tariff naming yardage charges cannot relieve it from the obligation to comply with the order, since, as shown above, the Packers & Stock Yards Act does not affect the

Commission's jurisdiction over transportation as defined in the Interstate Commerce Act and its jurisdiction to prescribe the practice necessary or proper to secure delivery of property transported upon just and reasonable terms. The holding of the Court in *Adams* v. *Mills*, 286 U. S., at 415, is applicable here:

> The question at issue is not the reasonableness of the charge, but the lawfulness of the practice, jointly pursued by the railroads and the [stock yards] company, of collecting the extra charge from the shipper. The reasonableness of the charge itself, and the complementary question whether the railroads should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto.

Nor does there seem to be any uncertainty as to the circumstances in which the yardage charges may or may not be imposed. The order plainly provides that such charges may not be imposed "in instances where delivery is taken at the unloading pens provided for such purposes."

V

Appellants are under the duty, inhering in every transportation service, to provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. The order in question does not enlarge this duty.

Appellants assert that the order requires them to accord to complainant the free use of a viaduct lead-

ing from the stockyards to the complainant's plant and thereby imposes upon them obligations beyond those imposed by law. But the order does not make such a requirement. It does presuppose that the appellants will fulfill the duty, included in the undertaking of all common carriers of goods and livestock, of delivering them to the consignee entitled to their possession, and to provide a space where the stock may be taken out of the car, and a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. This service inheres in every transportation. *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727; *Covington case*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70; *Allied Packers* case, 161 I. C. C. 641, 644.

VI

The long existence of a practice cannot clothe it with immunity

Appellants argue that the practice of assessing yardage charges at the Chicago Union Stock Yards has been in force for many years, that the Commission has acquiesced in it and is now precluded from condemning it. No case or ruling is cited in which the Commission has previously passed upon the question of the legality of the yardage charges at the Chicago Yards when assessed for the mere delivery of interstate shipments. Nor does it appear that it had come to the Commission's attention that these charges were being imposed upon interstate shipments in instances where no stockyards' services were

performed and where, as here, the charge was made solely for the privilege of egress from the yards. The assertion that the Commission has acquiesced in this practice seems unfounded. But even so, it could not escape the duty of determining the lawfulness of the practice when it was complained of in a proceeding instituted before it as violative of the Act. The long existence of a practice does not clothe it with immunity. *Warehouse Co.* v. *United States*, 283 U. S. 501, where Mr. Justice Stone said:

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, can not clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission*, 282 U. S. 740.

VII

The order was properly directed against the Stock Yards Company as well as against the railroads, since it functions for the carriers in providing livestock terminal facilities and in collecting all freight and other charges. In such circumstances the Commission is expressly authorized by statute to direct such an order against the Stock Yards Company and there was no occasion to redetermine its status as a common carrier

It is contended that the order is beyond the Commission's power because the Yards Company, which is among the defendants named in the order, was not and is not a common carrier engaged in interstate commerce subject to the Interstate Commerce Act or to the jurisdiction of the Commission.

The Stock Yards Company was held to be a common carrier by this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, and by the Commission in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 208, 213–214, and again by the Commission in a subsequent report in the same proceeding, 58 I. C. C. 164, 167, after full consideration of the history of the company, its activities, and its close association with and relationship to the trunk-line railroads transporting livestock to Chicago. It was admitted in the present case that the Yards Company "still owns the railroad" (R. 148) and, although there has been some change in the status of the affiliated or subsidiary companies (R. 147–148) it would seem that if it were necessary again to determine judicially whether the Yards Company is a common carrier, the determination should be in the affirmative, even though it does not now actually operate the railroad, in view of the broad provisions of section 1 (1) and (3) of the Interstate Commerce Act, and section 20 (1) thereof.

But it seems the question whether the Yards Company is now a common carrier is immaterial in the determination of the validity of the order here in question. The record shows, as the Commission finds, that the Yards Company is the agency employed by the carriers for the furnishing of their livestock terminal at Chicago. The rails of a public carrier—the Chicago Junction Railway—reach and enter upon the lands of the Yards Company and extend to the unloading platforms on its property. Each of the trunk-line carriers reaching Chicago has

rights of trackage over these rails, and, with their own engines and crews, bring in their trainloads of livestock. Upon arrival and placement alongside the unloading platforms, the Yards Company, acting as agent for and in the pay of, the line-haul carriers, unloads the livestock. For this service it receives $1.00 per car, which is paid to it by the line-haul carrier. This charge is published in a tariff which the Yards Company, in the manner provided by section 6 of the Interstate Commerce Act, has filed with the Commission. A copy thereof was introduced in the Commission proceeding as Exhibit No. 22 (page 27, "Original Exhibits"). It is Union Stock Yard & Transit Co. tariff I. C. C. No. 8, effective March 1, 1921, being a "Tariff naming loading and unloading charges on Live Stock at Union Stock Yards, Chicago", and providing as follows:

> The charge made by this Company for the service (as a carrier's agent) of loading and unloading Live Stock at the Union Stock Yards of Chicago, Ill., is as follows:
>
> For loading, one dollar ($1.00) per car of any capacity.
>
> For unloading, one dollar ($1.00) per car of any capacity.

Attention is called particularly to the parenthetical phrase in the tariff "(as a carrier's agent)", leaving no room for doubt that in performing this service it acts as agent for the line-haul carriers.

The Stock Yards Company also acts as agent for the line-haul carriers in many other capacities. In *Live Stock Loading and Unloading Charges*, 52 I. C. C.,

at pp. 213–214, the Commission found it so acts in performing the following eight services. The present record shows that it continues so to act in performing all these services, except that there is no direct evidence as to the first. The references to the present record are inserted in brackets:

(a) The service of guaranteeing the railroad companies against loss arising out of the delivery of livestock without the surrendering of the bill of lading.

(b) The service of guaranteeing freight charges. [R. 150, 155.]

(c) The service of loading and unloading the freight. [R. 149.]

(d) The service of notifying the consignees. [R. 116, 150, 154.]

(e) The service of correctly tabulating the car numbers and contents of the car. [R. 150.]

(f) The service of furnishing the weights to the carriers. [R. 154.]

(g) The service of maintaining records as to dead and crippled animals and of maintaining records showing deliveries to "billed consignees." [R. 150, 156, 175 and Ex. 15.]

(h) The service of furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago. [See numerous references given above in Sec. II.]

In the case at bar the Commission finds that the Union Stock Yards are served by all the individual line-haul carriers transporting livestock to Chicago, this service being accomplished by means of operation, under trackage rights, over the rails of the Chicago Junction Ry.; that these line-haul carriers

bring in their trainloads of livestock to the unloading platforms in the yards with their own locomotives and crews; that these yards are the livestock terminal at Chicago of all of these carriers, and that they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make. Under these facts it seems impossible to deny that the Yards Company acts as agent for the railroads in making delivery of shipments such as those involved in this case and covered by the Commission's order.[12]

As such agent it is bound by the Commission's order, in view of section 16 (7) of the Act, which provides:

> It shall be the duty of every common carrier, its *agents* and employees, to observe and

[12] The Yards Company keeps a careful record of the shipments delivered to complainant at the unloading pens. An exhibit prepared from the records of the Yards Company and introduced by General Manager Henkle (R. 156, 157), which exhibit is included in the separate volume of "Original Exhibits" before this Court, following page 36, shows the shipments consigned direct to Hygrade Company from Oct. 1, 1930, to Oct. 1, 1931, and also shows whether the shipments were "yarded" or "delivered." Mr. Henkle explained that the term "yarded" as used in the exhibit means that the animals in the shipment, after unloading into the chute or unloading pens, were removed from those pens by employees of the Yards Company and that in instances where the term "delivered" is used it means that the employees of the Hygrade Company themselves took delivery of the animals directly from the unloading chutes. (R. 157.)

> comply with such orders so long as the same shall remain in effect."[13]

Since under this provision the Yards Company would be bound to observe and comply with the order in question, even though it were not named therein, it would seem that its inclusion in the order, if erroneous, would be harmless and should be treated as merely surplusage, not rendering the order invalid either as to the railroads or the Yards Company. There were good reasons for including the Yards Company in the order, among others because as agent for the carriers it actually collects all the freight and other charges involved in this case, including the yardage charges. (R. 106, 107, 150, 155; and Ex. 11, p. 6 "Original Exhibits.")

In *Adams* v. *Mills*, 286 U. S. 397, 415, a case very similar in many respects to the case at bar, involving loading and unloading charges in the Chicago Union Stock Yards, the Court said:

> Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers. Compare *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366; *Union Stock-yards Co.* v. *United States*, 169 Fed. 404, 406.

[13] Various other provisions of the Act apply to agents of carriers as well as to the carriers themselves, e. g., section 10 (1), 15 (11), 16 (8), 16 (12); see also Elkins Act, section 1, first and second paragraphs, and section 2.

Moreover section 2 of the Elkins Act (32 Stat. 847, as amended, 34 Stat. 584, U. S. C. Tit. 49, sec. 42) authorizes the inclusion as parties, in addition to the carrier, of all persons interested in or affected by the rate, regulation, or practice under consideration, and orders may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to the carriers. This section reads:

> That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, *whether such proceedings be instituted before the Interstate Commerce Commission* or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, *in addition to the carrier*, all persons interested in or affected by the rate, regulation, or *practice* under consideration, and inquiries, investigations, *orders*, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Cf., *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 Fed. (2d) 490; *Merchants etc. Traffic Ass'n* v. *United States*, 231 Fed. 292; *United States* v. *Milwaukee Refrigeration T. Co.*, 145 Fed. 1007.

CONCLUSION

It is respectfully submitted that the decree of the Court below dismissing the bill for want of equity should be affirmed.

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MARCH 1935.

APPENDIX

The Interstate Commerce Act, as amended (U. S. C. Tit. 49) provides:

SEC. 1. (1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of * * * property wholly by railroad, * * *

SEC. 1. (3) The term "common carrier" as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artifical, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services

in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

SEC. 1. (6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6. (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the

several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

SEC. 6. (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates,

fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 10. (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of

not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own inititative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

SEC. 16. (7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

SEC. 20. (1) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. * * *

Elkins Act:

SEC. 1. That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who

shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court in the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate

commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or, foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a

civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Packers & Stockyards Act, 1921:

SEC. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary [of Agriculture] concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 606.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

No. 607.

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

Appellant,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

BRIEF ON BEHALF OF HYGRADE FOOD PRODUCTS CORPORATION, APPELLEE.

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INDEX.

PAGE

STATEMENT 1

STATEMENT OF FACTS 2

Differences in the character of service rendered to Hygrade from that rendered commission men and merchants 8

SUMMARY OF ARGUMENT 10

ARGUMENT—

POINT I. The order entered herein was within the jurisdiction of the Commission. It requires merely the completion by appellants of the transportation service of delivery (a) into pens suitable for proper delivery to consignee, and (b) without additional charge 13

(a) At common law, the service of transportation of livestock consigned to cities included the duty to deliver at destination (a) into pens suitable for proper delivery to consignee, and (b) without additional charge 16

(b) The common law transportation duty to deliver without additional charge was recognized and continued by Congress when it enacted the Interstate Commerce Act 21

(c) The order of the Commission herein does not impose upon appellant line haul carriers obligations beyond those imposed by law 23

(d) There was no acquiescence by the Hygrade Company in the practices complained of such as to bar the granting of relief to it 25

PAGE

POINT II. Section 15 (5) of the Interstate Commerce Act was not intended to, and did not, limit the common law and statutory duty to carriers to make delivery into suitable yards as part of their transportation duty without the imposition of any charges in addition to the line haul rate. It is a restatement of the common law duty 27

(a) The history of Section 15 (5) of the Interstate Commerce Act shows that the purpose of the Act was to re-emphasize and re-confirm the fundamental proposition that delivery should be made to the consignee through facilities suitable for such delivery without extra charge over the line haul rate, as defined in Section 1 (3) of the Act 29

(b) The express terms of Section 15 (5) of the Interstate Commerce Act demonstrate that this section was not intended as a limitation on the duties of the carriers with respect to transportation as defined in Section 1 (3) of the Act 31

(c) The Interstate Commerce Commission, the body charged with the administration of the Interstate Commerce Act, has held that Section 15 (5) was not a limitation upon its jurisdiction to require carriers to make delivery without charges in addition to the line haul rates 32

POINT III. The jurisdiction of the Interstate Commerce Commission over transportation services, including the delivery of livestock at public stock yards, was not limited by the Packers and Stockyards Act, 1921 35

PAGE

POINT IV. The finding of the Interstate Commerce Commission in its report that the yards of the Stock Yard Company are the livestock terminal at Chicago of appellant line haul carriers is amply sustained both by the evidence and by authority.... 37

POINT V. No error was committed by the inclusion in the order of the Commission of the Union Stock Yard and Transit Company as one of the defendants against which the order was directed..... 46

(a) The Stock Yard Company is a common carrier subject to the jurisdiction of the Interstate Commerce Act..... 46

(b) The Stock Yard Company would have been subject to the order of the Commission herein whether or not it was included in said order by name..... 56

POINT VI. The findings of the Commission herein are ample to sustain its order made herein..... 58

(a) The findings of the Commission with respect to the point at which transportation service of the carriers terminates is definite and certain 58

(b) There was no necessity for the Commission's finding in this proceeding what arrangement should be made by appellants to comply with the order of the Commission. The manner in which the practice condemned was to be eliminated was left to the discretion of appellants 61

(c) The findings of the Commission are sufficient to sustain its order requiring appellants to abstain from the practice therein described.... 66

POINT VII. The decree of the District Court should be affirmed 71

PAGE

Interstate Commerce Act,

Section 1 ..... 3, 66
Section 1 (3) 27, 31, 56
Section 1 (6) 66, 67
Section 1 (18) 44
Section 1 (21) 65
Section 6 3
Section 6 (3) 62
Section 3 (4) 65
Section 12 (1) 21, 68
Section 15 (1) 21, 66, 67, 68
Section 15 (3) 62, 65
Section 15 (4) 65
Section 15 (5) 28, 29, 30, 31, 32, 33
Section 15 (7) 62
Section 16 (3) 25
Section 16 (7) 57

Judicial Code,

Section 238 (4) as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 1

Packers and Stockyards Act, 1921, 42 Stat. 159 ..... 5, 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934,

Nos. 606 and 607.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, Appellants, *v.* THE UNITED STATES OF AMERICA, *et al.*, Appellees.	No. 606.
THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, Appellant, *v.* THE UNITED STATES OF AMERICA, *et al.*, Appellees.	No. 607.

BRIEF ON BEHALF OF HYGRADE FOOD PRODUCTS CORPORATION, APPELLEE.

Statement.

These are separate appeals to this Court as permitted by Section 238 (4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, from a decree of the District Court for the Southern District of New York, constituted as required by statute (38 Stat. 220, 28

(Italics in this brief are ours unless otherwise stated.)

U. S. C. Section 47), which decree (R. 61) dismissed petitions of the appellants in No. 606 (R. 3) and No. 607 (R. 47) to set aside and enjoin an order of the Interstate Commerce Commission (R. 37) based upon the report of said Commission (R. 24, 195, I. C. C. 553). The order of the Interstate Commerce Commission required the appellants to cease and desist and thereafter to abstain from collecting certain yardage charges assessed against appellee Hygrade Food Products Corporation (hereinafter called "the Hygrade Company"), on livestock in carloads consigned to the Hygrade Company at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes. The decision of the District Court upon which its decree herein attacked was based is reported below at 8 Fed. Sup. 825.

Statement of Facts.

The Hygrade Company is a packer engaged in the purchase of animals and their slaughter and preparation for food. It has various plants throughout the country, one of which is located at 3830 South Morgan Street, Chicago, Ill. (R. 99), directly north of the yards of appellant, The Union Stock Yard and Transit Company (hereinafter called "the Stock Yard Company"), and is separated from those yards only by a proposed extension of Pershing Road or 39th Street (R. 99, Ex. 1). Appellee acquired possession of this Chicago plant on August 24, 1929; prior to which time it had been in the possession of another company (R. 101).

On March 17, 1931, the Hygrade Company filed with the Interstate Commerce Commission the complaint (R.

16), upon which the order of the Commission attacked herein was based. This complaint was subsequently amended on November 2, 1931 (R. 22). The original complaint alleged that the yards of the Stock Yard Company were the depot for the line haul carriers at Chicago for the delivery of livestock, that the Stock Yard Company was the agent of the carriers in accomplishing deliveries of such livestock, that with respect to livestock consigned to the Hygrade Company at Chicago, and delivered at the yards of the Stock Yard Company, certain yardage charges therein set forth were imposed although no service in addition to regular transportation services was rendered therefor, and that the imposition of such charges was unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and were collected without tariff authority in violation of Section 6 thereof.

By its amended complaint, filed November 2, 1931, the Hygrade Company alleged that irrespective of the character or amount of the yardage charges, the practice of the defendants in making the yards of the Stock Yard Company their depot for the receipt and delivery of livestock at Union Stock Yards, Illinois, and in making or causing to be made deliveries of livestock at said depot, pursuant to an arrangement whereby the Stock Yard Company was enabled to and did impose yardage charges upon appellee, was unjust and unreasonable in violation of Section 1 of the Act (R. 22, 23). It was also alleged that the imposition of said yardage charges was in violation of Section 6 of the Interstate Commerce Act, since they were collected without tariff authority (R. 24). Other allegations were made which have since become immaterial.

The Chicago plant of the Hygrade Company is located only on the rails of the Chicago Junction Railway Company. Some of the livestock, which it slaughters and prepares for food, it purchases from commission men and merchants on the yards of the Stock Yard Company (R. 102). Other livestock from points outside Chicago is consigned directly to the Hygrade Company at the station called "Union Stock Yards." Livestock so consigned is delivered by the line haul carriers, with their own train crews and their own locomotives at said station, to the platforms and sidings owned and controlled by the Stock Yard Company (R. 106, 135, 162, 168, 174), and are then unloaded by employees of the Stock Yard Company and placed in unloading chutes located at the foot of runways which lead from the unloading platforms (R. 106, 110, 148, 149, 61 I. C. C. 223). The unloading service is performed by the Stock Yard Company as the agent of the carriers, and tariffs covering this charge are filed with the Commission both by the line haul carriers and by the Stock Yard Company (R. 148, 178, 179). The present tariff of the Stock Yard Company filed with the Commission covering the loading and unloading charges is in evidence as Exhibit 22.

"Union Stock Yards" is a station within the Chicago switching district (R. 112, Galligan's Tariff, No. 20-S, I. C. C. No. 182, Item 1490, at p. 70). The tariff naming Union Stock Yards as a substation at Chicago is concurred in by all the appellant line haul carriers (R. 112, 113). Union Stock Yards as a station has nothing to do with the Stock Yard Company except that the yards of the Stock Yard Company are located at that substation (R. 110, 129). The rate basis applicable to deliveries of livestock at substation Union Stock Yards is the flat Chicago rate plus $2.70 where

the delivery is made by a Western carrier, or plus $1.35 where the delivery is made by an Eastern carrier (R. 110, 178-179, and tariff references there made).

The order of the Commission relates solely to certain yardage charges which were assessed against the Hygrade Company on those shipments of livestock consigned to the Hygrade Company at Union Stock Yards and delivered by the line haul carriers into unloading pens of the Stock Yard Company, with respect to which shipments Hygrade took delivery at the unloading pens. These charges, which are assessed and collected by the Stock Yard Company (R. 106, 107, Exs. 11, 23), are 35 cents per head on cattle, 25 cents per head on calves, 12 cents per head on hogs and 8 cents per head on sheep (R. 108, Ex. 23). The charges vary between $6 and $23 a car (R. 108).

The yardage charge imposed by the Stock Yard Company is billed to the Hygrade Company on the same bill which contains the freight charges collected by the Stock Yard Company acting as the agent of the line haul carriers (R. 106, 107, 109, 150, Ex. 11). These yardage charges are collected under the purported authority of a tariff filed with the Secretary of Agriculture under the Packers and Stockyards Act (R. 151, 152, Ex. 23). It is notable that the yardage charges collected are the same whether Hygrade as consignee takes immediate possession of its livestock at the unloading pens or leaves the stock at the yards for a considerable period (R. 107, 152) and whether or not it avails itself of the holding pens or other yardage services and facilities. The assessment of the charge against the Hygrade Company when immediate delivery of the animals is taken at the unloading pen is based upon the theory that a service in addition to trans-

portation is rendered by the Stock Yard Company since "such animals must be driven across the property of the Stock Yard Company" (R. 152), and this despite the fact that appellants have provided no other way of getting the animals from the unloading pens to a location outside the yards (R. 152).

As above stated, when the trains of the line haul carriers arrive at the platform of the Stock Yard Company, the livestock is unloaded by Stock Yard employees into unloading pens (R. 149, 150), which are situated at the foot of runways leading from the platforms of the Stock Yard Company (R. 134, 135, Ex. 19). In some instances, livestock is taken directly from these unloading pens by employees of the Hygrade Company, is driven over the runways and alleys of the Stock Yard Company to scales, where it is weighed for the purpose of computing the freight charges of appellants (R. 108, 154), and is then driven out of the yards by the shortest route by the employees of the Hygrade Company (R. 107, 108, 139). It is driven out of the yards either over an overhead driveway (R. 120, 139), the ownership of which is shown to be in the Stock Yard Company (R. 120), or through an underground tunnel (R. 120, 139), the ownership of which is not shown on this record.

Unless the livestock is thus taken directly from the unloading pens by Hygrade employees, the livestock is driven by employees of the Stock Yard Company from the unloading pens to holding pens where it is held to await the arrival of the employees of the Hygrade Company, and it is then delivered to them at the holding pens and again driven as before to the weighing scales and thence through

the alleys of the Stock Yards Company by the shortest route to the plant of the Hygrade Company (R. 107, 108).

The Commission found in its report that a yardage charge might properly be levied where the livestock of the Hygrade Company was taken from the unloading pens by the employees of the Stock Yard Company and was placed by them in holding pens (R. 29, 30). The order involved in this proceeding is directed only to such livestock as is taken by the Hygrade Company direct from the unloading pens and then driven from the yards (R. 37, 38).

The evidence is clear that with respect to livestock taken by the Hygrade Company at the unloading pens, no stock-yard service is rendered (R. 108). In order that the Company may get free delivery at all, it is necessary that the stock be taken within a very short time after it is unloaded (R. 150, 167).

The weighing, which is done by the employees of the Stock Yard Company before the livestock is driven off the yards, is solely for the benefit of the railroads to enable them to determine the amount of the freight charges. The Hygrade Company settles with the consignor on the basis of the invoice weights, that is, the weight at the point of origin, and not on the basis of the weight obtained from the Stock Yard Company (R. 129). The Hygrade Company makes no sales on the Exchange (R. 137) and they have every reason to remove the livestock consigned to them as quickly as possible so that they will not have to be fed and the Hygrade Company be charged with the Stock Yard rates on feed which are higher than those prevailing in the open market (R. 108, 109).

Differences in the Character of Service Rendered to the Hygrade Company from that Rendered Commission Men and Merchants.

In making its findings and order, the Commission has distinguished between livestock which receives some stockyard service as opposed to livestock which has received no service other than the service necessary in delivering it.

The service performed by the Stock Yard Company for commission men and merchants who operate on the yards is far more extensive than that performed for the Hygrade Company. It constitutes a stockyard service a charge for which could not be well challenged, although the reasonableness thereof might be disputed. It appears from the record that the commission men and merchants receive a multitude of additional services which the Hygrade Company does not receive *and does not want*. The Yards Company furnishes sales pens for the commission men in which to sell the cattle (R. 120, 135, 137). The cattle are moved from one point to another, being driven when necessary by employees of the Stock Yard Company, which furnish pen service and water (R. 120, 153). The commission men have special pens on the yard assigned for their deliveries. Particular sections of the yards are allotted to designated commission firms in which to hold their sales (R. 137). Holding pens of various sizes are furnished for the accommodation of odd lots purchased from commission men by buyers on the yards (R. 136). Where the commission men do not have their own employees at the scales, Stock Yard employees drive the livestock to the holding pens assigned to them (R. 137). About 75 to 80 per cent, of the time, the commission men receive more than one weighing, since a

shipment consigned to them may be sold to three or four men (R. 139), and since the animals are weighed in the presence of the commission men and the buyers (R. 153). After they are so weighed, the animals are driven by employees of the Stock Yard Company to suitable holding pens where they are held to await the disposition of the purchaser (R. 153). The weights furnished by the Stock Yard Company are also used by the commission men to make account sales and return to the consignors (R. 154). None of these services is furnished to the Hygrade Company which employs its own men to drive its livestock, accounts to its consignors on the basis of the invoice weight, and must, to obtain free delivery under the Commission's order, remove the livestock before it is taken by employees of the Stock Yard from the unloading pens.

The yardage charge made against the Commission men for all these services is the same as that charged Hygrade when it takes immediate delivery at the holding pens.

SUMMARY OF ARGUMENT.

POINT — PAGE

I. The order entered herein was within the jurisdiction of the Commission. It requires merely the completion by appellants of the transportation service of delivery (a) into pens suitable for proper delivery to consignee, and (b) without additional charge 13

(a) At common law, the service of transportation of livestock consigned to cities included the duty to deliver at destination (a) into pens suitable for proper delivery to consignee, and (b) to consignee without additional charge 16

(b) The common law transportation duty to deliver without additional charge was recognized and continued by Congress when it enacted the Interstate Commerce Act 21

(c) The order of the Commission herein does not impose upon appellant line haul carriers obligations beyond those imposed by law 23

(d) There was no acquiescence by the Hygrade Company in the practices complained of such as to bar the granting of relief to it 25

II. Section 15 (5) of the Interstate Commerce Act was not intended to, and did not, limit the common law and statutory duty to carriers to make delivery into suitable yards, as part of their transportation duty without the imposition of any charges in addition to the line haul rate. It is a restatement of the common law duty 27

POINT PAGE

(a) The history of Section 15 (5) of the Interstate Commerce Act shows that the purpose of the Act was to re-emphasize and re-confirm the fundamental proposition that delivery should be made to the consignee through facilities suitable for such delivery without extra charge over the line haul rate, as defined in Section 1 (3) of the Act..... 29

(b) The express terms of Section 15 (5) of the Interstate Commerce Act demonstrate that this section was not intended as a limitation on the duties of the carriers with respect to transportation as defined in Section 1 (3) of the Act..... 31

(c) The Interstate Commerce Commission, the body charged with the administration of the Interstate Commerce Act, has held that Section 15 (5) was not a limitation upon its jurisdiction to require carriers to make delivery without charges in addition to the line haul rates..... 32

III. The jurisdiction of the Interstate Commerce Commission over transportation services, including the delivery of livestock at public stock yards, was not limited by the Packers and Stockyards Act, 1921..... 35

IV. The finding of the Interstate Commerce Commission in its report that the yards of the Stock Yard Company are the livestock terminal at Chicago of appellant line haul carriers is amply sustained both by the evidence and by authority..... 37

POINT		PAGE
V.	**No error was committed by the inclusion in the order of the Commission of the Union Stock Yard and Transit Company as one of the defendants against which the order was directed**	46
	(a) The Stock Yard Company is a common carrier subject to the jurisdiction of the Interstate Commerce Act	46
	(b) The Stock Yard Company would have been subject to the order of the Commission herein whether or not it was included in said order by name	56
VI.	**The findings of the Commission herein are ample to sustain its order made herein**	58
	(a) The findings of the Commission with respect to the point at which transportation service of the carriers terminates is definite and certain	58
	(b) There was no necessity for the Commission's finding in this proceeding what arrangement should be made by appellants to comply with the order of the Commission. The manner in which the practice condemned was to be eliminated was left to the discretion of appellants	61
	(c) The findings of the Commission are sufficient to sustain its order requiring appellants to abstain from the practice therein described	66
VII.	**The decree of the District Court should be affirmed**	71

POINT I.

The order entered herein was within the jurisdiction of the Commission. It requires merely the completion of the transportation service of delivery (a) into pens suitable for proper delivery to consignee, and (b) without additional charge.

The order of the Commission requires the appellants "to cease and desist, on or before (a date named), and thereafter to abstain from the practices described in the aforesaid report which subject complainant (the Hygrade Company) to the payment of yardage charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, *in instances where delivery is taken at the unloading pens provided for such purposes*" (R. 37, 38).

The Commission states: "It does not appear that there is any occasion for placing the animals into holding pens if prompt delivery is desired. There cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock, and the accomplishment of proper delivery to complainant" (R. 30).

Where delivery is taken by employees of the Hygrade Company immediately upon being unloaded into unloading pens and is driven directly from the yards, no service in addition to the transportation service of delivery is performed and a charge in addition to that contained in the applicable tariffs may not be imposed either by the appellant carriers or by the Stock Yard Company.

The finding that no service in addition to that incident to transportation is rendered with respect to livestock, delivery of which is taken at the unloading pens is amply

sustained by the evidence. Livestock delivery of which is so taken is driven at once by the employees of the Hygrade Company to scales where it is weighed by the weigh-master of the Stock Yard Company, and is then driven directly out of the stock yards to the plant of the Hygrade Company (R. 108, 139, 150). Weights are obtained so that appellant railroads may compute their freight charges (R. 108, 154), as required by their tariffs (R. 118, 155).

The present practice, against which the order of the Commission is directed, is to assess a yardage charge, varying from $6 to $23 per car (R. 108)—the same charge which is assessed against commission men and merchants on the yards who receive stockyard services—against the Hygrade Company *merely for driving its own livestock with its own employees out of the yards of the Stock Yard Company where the railroad has delivered them* (R. 107). And there is no way in which livestock so delivered at the yards of the Stock Yard Company can be got out of the yards without passing over the driveways and alley-ways of the Stock Yard Company (R. 152).

The Commission found in its report (R. 26) that the yards of the Stock Yard Company are the livestock terminals of the line haul carriers entering Chicago, and, as is shown herein (*infra*, pp. 37 to 46) this finding is amply sustained by the evidence. Appellant line haul carriers have delivered livestock consigned to the Hygrade Company at the chutes and sidings of the Stock Yard Company even where the livestock contract specifically required that the stock should not be delivered at such yards (R. 113, 114, Exhibits 12, 13, Original Exhibits herein at pp. 7, 8).

The effect of the present practice is this: The Hygrade Company consigns livestock to *itself* at a station designated

in the tariffs of appellant carriers (R. 112, Galligan's Tariff No. 20-S, I. C. C. No. 182, Item 1490, p. 70). That station has the name of "Union Stock Yards"; not Union Stock Yard and Transit Company of Chicago. That station is as distinct a destination as is, *e. g.*, Proviso, Illinois, or Hammond, Indiana, both stations which are also in the Chicago Switching District. Hygrade pays, for delivery at that station, a rate in excess of the flat Chicago rate in the amount of $2.70 per car where the delivery is made by a western carrier or $1.35 per car where the delivery is made by an eastern carrier (R. 110, 178, 179, Galligan's Tariff No. 20-S, I. C. C. No. 182, p. 76). Appellant carriers deliver livestock consigned to this station named in their tariffs into the yards of the Stock Yard Company, which the Commission has found in its report, constitutes their terminal for the delivery of livestock at Chicago. The Hygrade Company cannot get the livestock consigned to it at that station without going upon the yards of the Stock Yard Company. *And for going upon the yards of that Company and driving its livestock away, it is compelled to pay a charge to the Stock Yard Company.* The order of the Commission herein prohibits the exaction of that charge, and that is all it prohibits.

That the transportation duty of common carriers includes the duty to receive the livestock, carry it to destination, *and deliver it to the consignee through yards suitable for proper delivery without additional charge* is a well established principle of common law, which was embodied in the Interstate Commerce Act. The order of the Commission herein merely requires that appellants perform that transportation duty.

(a) At common law, the service of transportation included the duty to deliver (a) into suitable pens for delivery to consignee, and (b) to consignee at destination without additional charge.

The common law duty of common carriers to transport and deliver livestock to the consignees in cities at destination through suitable yards without the imposition of a charge in addition to the regular line haul rates was well established long prior to the enactment of the Interstate Commerce Act. It was settled law that transportation included the duty of delivery at the place of destination, and that until delivery was made at the place of destination, the transportation service had not been completed.

North Pennsylvania Railroad Co. v. *Commercial Bank of Chicago*, 123 U. S. 727;
Covington Stock Yards Co. v. *Keith*, 139 U. S. 128.
See *Erie R. R. Co.* v. *Stuart*, 250 U. S. 465, at 468.

In the *North Pennsylvania Railroad Co.* case, a shipper had delivered to the defendant railroad company cattle for transportation, and had received in return an order bill of lading with directions to notify a certain company at the point of destination. The shipper had then drawn a draft against plaintiff bank for the acceptance of the company which was to be notified, and the plaintiff bank had forwarded it to a correspondent bank for acceptance by that company. The railroad delivered the livestock to a stockyard company which had turned it over to the company to be notified without requiring the production of the order bill of lading. This company had disposed of the livestock, and had refused to honor the draft of the plaintiff bank

upon presentation. Plaintiff bank brought suit against the railroad company for the amount of the draft, and a judgment by the lower court in favor of the plaintiff was affirmed by this Court, which stated, 123 U. S., at 733-734:

> "The duty of a common carrier is not merely to carry safely the goods intrusted to him, but *also to deliver* them to the party designated by the terms of the shipment, or to his order, *at the place of destination.* There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. *They are to be delivered at the place of destination to the party designated to receive them* if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of livestock is more strictly enforced. *Forbes* v. *Boston & Lowell Rail-*

road Co., 133 Mass. 154; *McEntee* v. *New Jersey Steamboat Co.*, 45 N. Y. 34."

In the case of *Covington Stock Yards Company* v. *Keith*, 139 U. S. 128 (decided October Term, 1890), the Court had before it a consideration of the duties of carriers with respect to the delivery of livestock in cities. It held that the carriers' duty to deliver, as a part of transportation, imposed upon it two obligations with respect to the delivery of livestock in cities, to wit: (a) the duty of providing "inclosed yards or lots, convenient to the place of unloading" such "as will enable it properly to deliver the stock to the consignee"; and (b) to complete the delivery of the stock without additional charge.

With respect to the duty of the carrier to provide yards proper for delivery therefrom of the live stock, the court said (139 U. S. 128 at 134):

> "When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and

such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee."

With respect to the duty of completing its delivery without extra charge, the court said (139 U. S. at 135, 136):

"* * * A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession."

The common law therefore required that a carrier should provide facilities for the receipt and delivery of livestock without cost to the shipper in addition to the lawful line haul rates applicable. It was, of course, in the discretion of the carrier whether it would provide the facilities by

building and maintaining them at its own cost, or whether it would employ the facilities of others. But whatever method was adopted, the common law required that the carrier and not the consignee or shipper should bear the charges, if any, for the receipt and delivery of livestock.

On the facts, the situation in the *Covington* case is, we submit, on all fours with the situation in the instant case. Covington was a station on the Kentucky Central Railroad. Union Stock Yards is a station on the Chicago Junction Railway and by trackage arrangement is a station of all of the appellants herein. In the *Covington* case, the railroad had not provided any facilities of its own at that station for handling livestock. The same is true in the present case. In the *Covington* case, the railroad had turned over to a privately owned stockyards the task of handling livestock consigned to shippers at Covington. The railroads have done the same with respect to the Union Stock Yards in the present case. In the *Covington* case, the original complainant, Keith, had facilities of his own alongside of the privately owned stockyards to which the railroad was making delivery and Keith desired to have delivery of livestock made onto his own facilities. The same situation is true in the instant case with respect to the Hygrade Company; it has facilities of its own immediately adjoining the Stock Yards facilities and on the rails of the Chicago Junction Railway. In the *Covington* case the court confronted the carriers with the alternative of making deliveries to Keith through the privately owned stockyards used by the railroad free of charge, or of the delivery to Keith in his own facilities. In the instant case, the Commission denied to Hygrade the alternative of delivery into its own facilities, but did require delivery free

of additional charge through the privately owned facilities actually provided by the railroads.

(b) The common law transportation duty to deliver without additional charge was recognized and continued by Congress when it enacted the Interstate Commerce Act.

The legislation which Congress has enacted defining the duties of common carriers, and conferring upon the Interstate Commerce Commission the power to enforce those duties, has recognized that the duty of transportation undertaken by common carriers includes that of delivery. The Interstate Commerce Act, as amended, has conferred upon the Commission jurisdiction to regulate the charges and practices of common carriers subject to the Act in connection with the delivery of property. Interstate Commerce Act, Sections 12 (1) and 15 (1).

The original Act to Regulate Commerce, approved February 4, 1887, chapter 104, 24 Stat. 379, provided in Section 1 thereof that all charges for any service rendered or to be rendered in the transportation of passengers or property

> "or for the receiving, *delivering*, storage or handling of such property shall be reasonable and just."

The original Act therefore expressly recognized that the duty to transport included the duty to deliver at destination. If any doubt existed under the original Act that transportation included the duty of delivery, it was resolved by the amendment to the Act by the Act of June 29, 1906, chapter 3591, 34 Stat. 584. Section 1 of that Act defined the term "railroad" to include all facilities used or necessary in the delivery of property, and also defined the term

"transportation" to include all services in connection with delivery. The pertinent part of the section is as follows:

> "The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or *delivery* of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and *all services in connection with the receipt, delivery,* elevation, and transfer in transit, ventilation, refrigeration or icing, storage, *and handling of property transported.*"

The definitions of the terms "railroad" and "transportation" were again enlarged by the Act of February 28, 1920, chapter 91, Section 400, 41 Stat. 474.

This Court held in *C. C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, that by the amendment to the Act to Regulate Commerce, approved June 29, 1906, Congress recognized that the duty of the carriers to the public included the performance of a variety of services which, according to the theory of the common law, were separable from the carrier's service as carrier, and that in order to prevent overcharges and discriminations from being made under the pretext of performing additional services, it was enacted

that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like. Congress, in defining the term "transportation" to include "delivery," did not extend the common law duty of the carriers, but merely incorporated into the statute law in explicit terms a requirement which had existed theretofore at common law, and conferred jurisdiction upon the Interstate Commerce Commission to enforce the delivery duty of the carriers.

(c) The order of the Commission does not impose upon appellant line haul carriers obligations beyond those imposed by law.

The record herein shows that egress from the yards of the Stock Yards Company is afforded to the Hygrade Company by means of an elevated driveway over the pens of the Stock Yard Company, and also by means of a tunnel under the proposed Pershing Road, which separate the yards from the plant of the Hygrade Company (R. 121, 139). The record shows, contrary to the statement made in appellant carriers' brief at 49-54, that both of these facilities are employed by the Hygrade Company in removing its livestock from the yards of the Stock Yard Company. The testimony of the assistant to the head hog buyer of the Hygrade Company shows that the livestock "are taken over an overhead viaduct leading into the packing house *and* down through the subway where the river used to be" (R. 139).

Appellant carriers claim for the first time in this Court that, because some of the livestock consigned to the Hygrade

Company and delivered at the yards may be driven by the employees of the Hygrade Company over the viaduct owned by the Stock Yard Company, the order directing that no yardage charge be imposed is void. (Brief in 606, pp. 49-54.) This claim was never urged before the Commission nor before the lower court in this case. It was not included in the assignment of errors of the appellants in No. 606, and it should not be considered here.

Clark v. *Williard*, 55 Sup. Ct. 356, at 358, decided February 4, 1935;
Zellerbach Co. v. *Helvering*, 293 U. S. 172;
Warner Co. v. *Independent Pier Co.*, 278 U. S. 85, at 91.

Even though this Court choose to consider the argument, it is obviously untenable. Appellant carriers have constituted the yards of the Stock Yard Company their terminal at Chicago. They deliver livestock consigned to the Hygrade at Union Stock Yards into those yards. Under these circumstances, they must afford to the Hygrade Company a means of egress therefrom without additional charge, and any facility which is necessary for that purpose is not a special facility. A carrier, to fulfill its obligation to deliver, must provide without charge a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property, or from the property which the carrier has seen fit to employ, without additional charge.

Covington Stock-Yards v. *Keith*, 139 U. S. 128 at 134;

Norfolk & Western Railway Co. v. *Public Service Commission of West Virginia*, 265 U. S. 70, at 74.

This Court said in the latter case, at 74:

> "Any measure promulgated by the state to require a railroad company to provide suitable facilities reasonably necessary for the removal from its premises of freight carried by it for its customers does not create a new duty or impose any unnecessary burden."

(d) There was no acquiescence by the Hygrade Company in the practices complained of such as to bar the granting of relief to it.

The Hygrade Company purchased and took possession of its Chicago plant on August 24, 1929 (R. 101). It filed its complaint herein on March 17, 1931, well within the time limited by the Interstate Commerce Act within which suits to recover reparations may be brought. Section 16, paragraph 3 of the Interstate Commerce Act provides in subparagraph (b) thereof that all complaints against carriers subject to the Act for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues. The complaint herein was filed one year and seven months after the Hygrade Company took possession of its plant, and reparation was sought with respect to all shipments delivered to the Hygrade Company since it took possession of the plant (R. 103). The complaint was filed with the Commission only after the Hygrade Company had ascertained that the appellants would not voluntarily alter the practices whereby the Hygrade Company was subjected to the

payment of charges in addition to the line-haul rate for the mere transportation service of delivery. But it was brought prior to the time when any single claim for reparations was barred by the Statute of Limitations prescribed in the Act.

This Court had held on numerous occasions that objectionable practices of the carrier with respect to transportation may be stopped by order of the Commission irrespective of the length of time they may have continued.

> *Los Angeles Switching Case*, 234 U. S. 294;
> *Louisville & Nashville R. R. Co.* v. *United States*, 282 U. S. 740.

This Court said in the *Los Angeles Switching Case*, 234 U. S., at 312-313:

> "It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge, if freight were received and delivered thereon, and that the charge in question had been generally maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. (See *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482; *Phila., Balt. & Wash. R. R. Co.* v. *Schubert*, 224 U. S. 603, 613, 614.) If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions and from securing its order directing the carriers to stop the objectionable practise."

And it recently said in *Louisville & Nashville R. R. Co. v. U. S.*, 282 U. S. 740, at 759:

> "Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice."

The principles announced by this Court in the foregoing cases apply here. The practice of the appellants of creating a situation whereby charges in addition to the lawful applicable rates may be and are assessed against the Hygrade Company for the mere transportation service of delivery have been found to be unlawful, and an order directing that they may be stopped is justified.

POINT II.

Section 15 (5) of the Interstate Commerce Act was not intended to, and did not, limit the common law and statutory duty of carriers to make delivery into suitable yards as part of their transportation duty without the imposition of any charges in addition to the line haul rate. It is a restatement of the common law duty.

While appellant carriers do not seriously contest that at common law, and under the provisions of Section 1 (3) of the Interstate Commerce Act, the duty of transportation

which they undertake includes the duty of delivery to the consignee at a place where he might safely take into possession all livestock consigned to him and remove them without being required to pay charges in addition to the lawfully applicable tariff charges, they contend that paragraph 5 of Section 15 of the Interstate Commerce Act was intended to limit that duty, in the case of deliveries made at public stockyards, to delivery into suitable pens within such yards. If this contention is sustained, it will enable line haul carriers, merely by designating public stockyards as their terminals, at various points throughout the country, to place it in the power of such public stockyards to levy upon, and exact from, consignees a charge in addition to the rates prescribed in tariffs published by the carriers, and will thus permit the introduction of the abuses which the Interstate Commerce Act was designed to abolish. *C. C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588 at 594. But aside from this consideration, however important it may be, the history of the enactment of Section 15 (5), the terms thereof, and its construction by the Interstate Commerce Commission, the body charged with its enforcement, show that it was intended not as a restriction upon the duties of common carriers, but as a clarification of their duties in respect of delivery through a public stock yards. It made it clear that where such delivery was made, no charge by anybody should be made to the shipper for unloading into suitable pens. It clearly provided that transportation should include such delivery into "*suitable*" pens—that is, suitable among other things, for the consignee to obtain delivery without further charge.

(a) The history of Section 15 (5) of the Interstate Commerce Act shows that the purpose of the Act was to re-emphasize and re-confirm the fundamental proposition that delivery should be made to the consignee through facilities suitable for such delivery without extra charge over the line haul rate.

The commission merchants at the Union Stock Yards, Chicago, were confronted with the burden of paying an unloading charge over and above the line haul rate. The matter they complained of was this unloading charge. At the time of the enactment of Section 15 (5) the Commission had decided (52 I. C. C. 209) that the unloading charge was a proper charge. (As the Court is aware, the Commission subsequently reversed itself on this point and its reversal was sustained in *Adams* v. *Mills*, 286 U. S. 397.)

An appeal was made to Congress. Congress, true to the concept that delivery should be made without additional charge, prescribed in Section 15 (5) that the additional charge for unloading complained of should not be collected.

As was said by the Interstate Commerce Commission in the *Allied Packers case*, 161 I. C. C., at 646:

> "The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges (the loading and unloading charges) to the line-haul charges on shipments of livestock to and from public yards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the conception of it contained in section 1, or to restrict our jurisdiction."

The appellants would have us believe that, whereas the law before Section 15 (5) with respect to deliveries into public stock yards required that the consignee be so circum-

stanced as to be able to receive his freight without extra charge over and above the line haul rate (either extra charge for unloading or extra charge for yardage), Congress had intended by Section 15 (5) to take away from shippers rights with respect to delivery which had existed theretofore and to leave them in a position where the entire transportation duty was completed upon the cattle being dumped down into the unloading pen inaccessible to the consignee unless he paid a further charge to a private company. The mere statement of the proposition shows how untenable such a contention is.

The word "suitable" used in Section 15 (5) obviously meant more than suitable to prevent the animals escaping or being injured. The carriers and the Stock Yard Company would in any event have to maintain that sort of suitability to protect themselves against damage claims or violation of city ordinances. The main connotation of the word "suitable" was that it should be suitable for accomplishing actual delivery of the stock to the consignee thereby enabling the carriers to complete their transportation duties. This was the view of the Interstate Commerce Commission in the *Allied Packers* case, 161 I. C. C. 641 at 644, and was its view in the instant case (R. 59) and is in accordance with what the Court established to be the duties of the carriers with respect to unloading pens in the *Covington* case. The appellants would have us believe that under Section 15 (5) the carriers could with propriety unload the cattle into pens from which there was no exit except by a gate into holding pens for the use of which holding pens yardage charges might properly be imposed.

(b) The express terms of Section 15 (5) of the Act demonstrate that this section was not intended as a limitation on the duties of the carriers with respect to transportation as defined by Section 1 (3) of the Act.

Paragraph 5 of Section 15 of the Interstate Commerce Act was added to the Act by Section 418 of the Act of February 28, 1920, 41 Stat. 486. It provides that transportation wholly by railroad of ordinary livestock in carloads destined to or received at public stockyards shall "include" • • • "delivery at public stockyards of inbound shipments into suitable pens • • • without extra charge therefor to the shipper, consignee or owner", with exceptions not here pertinent. It will be noted that "transportation" is defined in Section 15 (5) to "include" a certain service. It is the same term which is used in Section 1, paragraph 3, of the Act, where the term "railroad" is defined to "include" certain facilities not theretofore considered as implicit in that term, and where the term "transportation" is defined to "include" certain services and facilities which would not ordinarily be considered as coming within the meaning of that term. Controversy having arisen as to whether unloading into a public stock yard was included in transportation without extra charge, Congress set this at rest by saying that it was so included. The use in Section 15 (5) of the same term as that contained in Section 1, paragraph 3 of the Act indicates the purpose of Congress.

If there had been any intention on the part of Congress to enlarge a previous duty of the carrier and to restrict the carrier's additional duty merely to unloading, it would have employed terms appropriate to accomplish that purpose. It might easily have said, if such were its intention, that the transportation of livestock destined to or

received at public stockyards "shall be limited to" unloading into suitable pens at such yards.

(c) The Interstate Commerce Commission, the body charged with the administration of the Act, has held that Section 15 (5) was not a limitation upon its jurisdiction to require carriers to make delivery without additional charge.

The construction of an act by an administrative body charged with its enforcement has been held to be entitled to great weight by the courts.

> *U. S.* v. *C. N. S. & M. R. Co.*, 288 U. S. 1, at 13;
> *Brewster* v. *Gage*, 280 U. S. 327, at 336;
> *N. Y. N. H. & H. R. Co.* v. *I. C. C.*, 200 U. S. 361, at 401.

Consequently, the interpretation placed upon Section 15 (5) by the Interstate Commerce Commission should be followed in this case unless it is obviously erroneous.

Appellant carriers contend in their brief that the Commission has placed a construction upon this section of the Act which limits the duty of the carriers to the mere service of unloading at public stockyards. To support this construction, they cite *Southwestern Horse & Mule Co.* v. *Carriers*, 129 I. C. C. 730, and *Allied Packers* v. *Carriers*, 144 I. C. C. 377. Neither of these decisions was a decision by the full Commission. The *Southwestern Horse & Mule Co.* case was decided by Division 1 of the Commission consisting of three of the eleven Commissioners, and the *Allied Packers* case was decided by Division 2 of the Commission also consisting of three of the eleven Commissioners.

The only case in which the question of the contruction of Section 15 (5) was considered by the full Commission is *Allied Packers* v. *A. T. & S. F. Ry. Co.*, 161 I. C. C. 641. The full Commission there reversed the decision of Division

2 (144 I. C. C. 377), and held that it had jurisdiction over yardage charges assessed at public stockyards where no transportation service beyond that of delivery was rendered. The Commission there said, referring to Section 15 (5), at page 646:

> "The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction. The sense of the paragraph is that the services named shall be performed at the carriers' expense without additional charge to the shipper.
>
> The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an

> intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. *25 Ruling Case Law*, page 918."

It further said at page 647:

> "We find that the charges herein assailed in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges."

E. Kahn's Sons Co. v. *Carriers*, 192 I. C. C. 705, and *Adolf Gobel, Inc.* v. *B. & O. R. R. Co.*, 200 I. C. C. 606, cited by appellant carriers in their brief at pages 33-34, are not in point. In both of these cases the complainants could obtain free delivery at the unloading pens without the imposition of any additional charge for the mere service of delivery. The order of the Commission in the present case merely prohibits the assessment of charges under circumstances in which no charges were attempted to be assessed by the defendants in those cases. Thus, the report of the Commission in *E. Kahn's Sons Co.* v. *Carriers* stated, 192 I. C. C. 705, at 706:

> "No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed, but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied. This charge is made also where consignees take possession of the livestock at the scales."

The quotation from the tariff of the Union Stock Yard Company of New Jersey, contained in the report of the Commission in the *Adolf Gobel, Inc.*, case, at 608, shows that a similar condition prevailed at the yards of that Company.

The opinion of the Commission must be read in connection with the facts upon which it was based. *Doyle* v. *Continental*, 94 U. S. 535.

Admittedly, the jurisdiction of the Commission does not extend to charges for stockyard services, and it was in connection with an attempt to invoke its jurisdiction to obtain relief from the imposition of charges for yardage services that the language quoted in the briefs of appellant carriers was used.

POINT III.

The jurisdiction of the Interstate Commerce Commission was not limited by the Packers and Stockyards Act, 1921.

Appellants contend that the Packers and Stockyards Act, 1921, 42 Stat. 159, was intended to and did limit the jurisdiction of the Interstate Commerce Commission to such services as were required by the carriers to unload livestock at public stockyards into suitable pens (Brief in No. 606, at 24). That Act, however, was intended solely to regulate the operations of public stockyards in their capacity as a market place for buying, selling and dealing in livestock, and to regulate the commission men, traders and others operating on the yards. The Act provided that nothing therein contained should affect the power or jurisdiction of the Interstate Commerce Commission, nor confer

upon the Secretary (of Agriculture) concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

The plainly expressed intention of the Act, therefore, is to confer upon the Secretary of Agriculture jurisdiction over such services only as are not a part of the transportation duty of the carriers. The Interstate Commerce Commission has so recognized in the case of *Allied Packers v. A. T. & S. F. Ry. Co.*, 161 I. C. C. 641. The contention was there made that the Packers and Stockyards Act had removed from the Commission the power to regulate the practices of carriers at the Buffalo Stockyards whereunder an additional charge was assessed upon the consignees for the mere service of delivery. The Commission, in rejecting this contention, stated, 161 I. C. C. at 647, as follows:

> "The primary purpose of the packers and stockyards act, 1921, is to regulate the operations of packers, commission merchants, and stockyard owners in connection with the handling of livestock consigned for sale at primary markets, *Stafford* v. *Wallace*, 258 U. S. 495, 514. That act expressly states that its provisions shall not affect the power or jurisdiction of this commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within our power or jurisdiction. In considering the question of our jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, we stated in *Strauss & Adler* v. *New York C. R. Co.*, 153 I. C. C. 609, at page 618:
>
> > 'Bearing in mind that the two acts should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal agencies entrusted with their enforcement, and

recognizing that any doubt which may exist is by the above provision to be resolved in favor of the authority delegated in the older of the two statutes, we can see nothing in the provisions of the packers and stockyards act, 1921, which in any way limits or affects the jurisdiction of this commission previously conferred to regulate 'all charges * * * for any service rendered or to be rendered in the transportation of passengers or property.' "

POINT IV.

The finding of the Interstate Commerce Commission in its report that the yards of the Stock Yard Company are the livestock terminal at Chicago of the appellant line haul carriers is amply sustained both by the evidence and by authority.

The Commission found in its report that the yards of the Stock Yard Company are the livestock terminal of all of the line haul carriers at Chicago (R. 26). If this finding of the Commission is supported by evidence, it is final and conclusive.

Adams v. *Mills*, 286 U. S. 397, at 410;
A. T. & S. F. Railway Co. v. *United States*, 232 U. S. 199, at 221;
Los Angeles Switching Case, 234 U. S. 294, at 310, 311.

The evidence in the record in this case is ample to support the finding of the Commission. It shows that when the Stock Yard Company was incorporated, $925,000 of its $1,000,000 authorized capital stock was subscribed by the nine trunk railroads then reaching Chicago (R. 147).

Its charter conferred upon it the right to construct and operate a stock yards, and also provided in Section 3 thereof that "the said Company shall construct a railway, with one or more tracks, as may be expedient, over the grounds which may be selected for its said yards, so as to connect, outside of the City of Chicago, the same with tracks of all the railroads which terminate in Chicago * * * and shall have the right and power to make such connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies, which now is or hereafter may be constructed, for the purpose aforesaid as may be agreed upon between the parties" (Exhibits 20, 21, Original Exhibits filed herein, pp. 10-26).

Section 3 of the charter of the Stock Yard Company indicates that it was organized with the intention that it should construct a railway over which the engines, trains and crews of the line haul carriers might haul their train loads of livestock directly to the yards of the Stock Yard Company. As soon as the railroad of the Stock Yard Company was constructed, this practice was inaugurated, and still continues to exist (R. 162). The only through rate for livestock applying to deliveries on the rails of the Chicago Junction Railway is that which applies to deliveries at the platforms and chutes of the Stock Yard Company (R. 164, 179).

Tariffs concurred in by all of the trunk line railways entering Chicago name Union Stock Yards as a sub-station within the Chicago switching district (R. 110, 112, Galli-

gan's Tariff No. 20-S, I. C. C. No. 182, Item 1490, p. 70), and also state the rates applicable to deliveries at that sub-station (R. 112, 113, Galligan's Tariff No. 20-S, I. C. C. No. 182, p. 76). These rates are higher by $2.70 in the case of deliveries by western carriers and $1.35 in the case of deliveries by eastern carriers than the flat Chicago rates (R. 110, 178, 179).

There is considerable evidence in the record that delivery by the line haul carriers in train load lots with their own engines and with their own crews at the platforms of the Stock Yard Company is the only method by which the volume of livestock daily reaching Chicago could be efficiently handled. In 1930 the Stock Yard Company unloaded for 23 railroads 204,828 cars containing more than 14,000,000 animals, and loaded out 48,501 cars. Practically all of these cars were brought to the Stock Yard Company chutes in train load lots, some trains having as many as 70 cars (R. 149). The report of the Commission in 71 I. C. C. 631 wherein it was stated that all parties agreed that this was the only practical method of handling the livestock traffic at Chicago was referred to, and the witness declared that this conclusion was correct (R. 151, 153, 154). If side-track deliveries were again required, it was declared that it would be a reversion to practices which obtained over 25 to 50 years ago, but which had been outgrown (R. 156, 166).

There is not one word of evidence in the record in this case that a single carload of livestock was ever delivered in Chicago at a place other than at the yards of the Stock Yard Company. The volume of the traffic handled by the Stock Yard Company is vast (R. 149, 175). Not only does the record show that the line haul carriers make delivery of all livestock consigned to sub-station Union Stock Yards,

Chicago, at the yards of the Stock Yard Company but it also shows that they deliver such livestock at the yards of the Stock Yard Company *even where the billing expressly provides that they shall not go into such yards.* A witness for the Hygrade Company testified that that Company had billed 22 cars of livestock to Chicago with an explicit statement on the livestock contract not to deliver at the yards of the Stock Yard Company. The cars so billed, together with the directions written on the bill, are shown in Exhibit 13, Original Exhibits filed herein at page 8. A copy of a single livestock contract containing this billing is at page 7 of the Original Exhibits filed herein. Despite this billing, the livestock was taken to the yards of the Stock Yard Company and delivered therein, and the Hygrade Company was forced to pay the yardage charges thereon (R. 113, 114). No notice that this procedure had been followed was given to the Hygrade Company until after the arrival of the stock at the stock yards, and no notice whatever was given by the carriers who were responsible for the movement (R. 116, 161, 162, 177). This action on the part of appellant carriers is particularly important in view of their contention that they have yards in the Chicago switching district at which livestock may be delivered.

The Stock Yard Company has been repeatedly held to be the livestock terminal of the carrier entering the Chicago switching district both by the Commission and by this Court.

Livestock Loading and Unloading Charges, 52 I. C. C. 209, 224, s. c., 58 I. C. C. 164, at 167, 168;

Adams v. *Mills,* 286 U. S. 397, 409;

United States v. *Union Stock Yards,* 226 U. S. 286.

This evidence and the previous holdings of the courts fully support the Commission's finding herein that the yards of the Stock Yard Company constitute the livestock terminal of the line haul carriers at Chicago. There is no evidence whatever to the contrary.

There is no substantial evidence in the record that the line haul carriers maintain yards other than those of the Stock Yard Company at which deliveries of livestock may be made.

Appellants have contended in their briefs that they maintain facilities on their own rails at which delivery of livestock consigned to Chicago can be obtained (Brief in 606, at p. 36). The Commission found with respect to this contention:

> "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line haul carriers maintain facilities for unloading livestock, the use of which by complainant is impractical" (R. 26).

The finding of the Commission is the only one which could have been made on the record made in this case. Appellants did not introduce a single word of evidence to show that they had any facilities whatever within the Chicago switching district, or if they had such facilities, that they were adequate or efficient. They rely to support their position on certain evidence brought out on the cross-examination of the Hygrade Company's Traffic Manager, which is set forth in full at R. 121, 122, and on statements contained in certain tariffs filed by the appellants with the Interstate Commerce Commission to which reference was made by the Hygrade Traffic Manager (R. 112, 113).

The Hygrade Company's witness merely gave oral expression to statements which he had seen in tariffs of the carriers. He did not pretend to any knowledge of the adequacy of the facilities provided by the line haul carriers, and made no statement with respect thereto. No burden rested upon the Hygrade Company to show before the Commission that the appellants did not have adequate and available facilities at other points in Chicago at which deliveries of livestock could be made. The Commission is a fact-finding body, and if appellants desire to rely upon facts with respect to other facilities, they should have introduced evidence with respect thereto.

Florida v. *United States*, 282 U. S. 194, at 215.

There is evidence, however, which leads to the direct inference that the carriers maintain no such facilities as they affirm, but neglect to prove, that they possess. When livestock was billed to the Hygrade Company with the express instruction that it should not be taken to the yards of the Stock Yard Company (R. 113, 114, Exhibits 12, 13), it was nevertheless delivered at those yards and the Hygrade Company was compelled to pay the yardage charge (R. 114). If appellants have such facilities as they claim, why did they not conform to the instructions of the billings and, since they refused to make a side-track delivery at complainant's plant, deliver such livestock at the facilities which they now suggest that they possess? The only conclusion possible is that the appellants did not maintain adequate facilities at any point in Chicago other than those at the yards of the Stock Yard Company, and that the reference in their tariffs to other facilities is merely for the purpose of enabling them to charge an additional sum for making deliveries at substation Union Stock Yards.

Appellants suggest that the arrangement whereunder they deliver live stock with their own trains and their own crews at the sidings of the Stock Yard Company is a "voluntary arrangement" which they may terminate at any time. They also suggest that their right to cancel the present rate and trackage arrangement should be conceded.

The record shows that appellant-carriers all concur in a Tariff which names Union Stock Yards as a substation in the Chicago Switching District and provides the rates applicable thereto. (R. 110-113, Galligan's Tariff, No. 20-S, I. C. C. No. 182, Item 1490 on page 70, and page 76). The rates for delivery at substation Union Stock Yards, Chicago, are in excess of the flat Chicago rate in the amount of $2.70 where delivery is made by a Western carrier and $1.35 where delivery is made by an Eastern carrier (R. 110, Tariff references given above).

The "Chicago Switching District" is something entirely distinct from Chicago. It is a territory the boundaries of which are prescribed in Galligan's Tariff, No. 20-S, I. C. C. No. 182, page 8, note 2, and extends on the west several miles outside of the City limits of Chicago and on the south and east goes so far as to take in the large cities of Hammond and Whiting, Ind., with all their substantial industries. Within this territory designated as "Chicago Switching District" are upwards of 450 stations and designations many miles apart as far as from Des Plaines on the north to Hessville, Indiana, on the south.

Appellant line haul carriers operate over the tracks of the Chicago Junction Railway Company to the chutes and sidings of the Stock Yard Company under a trackage arrangement which has been in effect for more than sixty years (R. 162). The Commission when it authorized the

present lease of the railroad properties of the Stock Yard Company specifically provided at the request of other intervening carriers that:

> "The present traffic and operating relationship existing between the Junction and River Road and all carriers operating in Chicago shall be continued in so far as such matters are within the control of the Central."
>
> *Chicago Junction Case*, 71 I. C. C., 631 at 639.

The traffic arrangements which appellants have with the Chicago Junction Railway Company and its present sublessee, the Chicago River & Indiana Railroad Company, constitute the tracks of the Chicago Junction Railway a part of the railroad line of each of appellant line haul carriers, and further constitute substation Union Stock Yards, a station on their line of railroad. They could not cease to deliver live stock at substation Union Stock Yards without the consent of the Commission obtained in an abandonment proceeding under Section 1 (18) of the Interstate Commerce Act—*Transit Commission* v. *United States*, 289 U. S. 121.

This Court there said, referring to a trackage arrangement which the Long Island Railroad Company had with the Pennsylvania Railroad Company, at 129:

> "The use is a joint one, but it is nevertheless 'operation.' And the phrase, 'engage in transportation . . .. by means of such additional or extended line of railroad' reasonably may be deemed to include a line owned by another carrier. The Long Island's use of the Pennsylvania lines covered by the agreement serves the same purpose as would the acquisition of such lines by purchase or

> the construction by it of a like extension into Manhattan. The provision as to abandonment is also significant, for if the Long Island were to cease to use the lines covered by the agreement, it reasonably might be held to have abandoned a 'portion of a line of railroad.' Any interpretation excluding the lines of railroad in question would conflict with implications of our decisions. *Alabama & V. Ry.* v. *Jackson & E. Ry., supra,* 250. *Cleveland, C. C. & St. L. Ry.* v. *United States,* 275 U. S. 404, 409. The provisions of paragraph (18) undoubtedly apply to the operations under trackage agreements such as that under consideration."

Since substation Union Stock Yards is a station on the line of each of appellant-carriers at which they are required to make deliveries of live stock, they must provide facilities for making such deliveries without additional charge at that station. The fact that they have facilities at another station to which a different and lower rate applies is entirely immaterial, as pointed out by complainant's witness on cross-examination.

Mr. O'Brien, General Manager of the Chicago Junction Railway, called as a witness for the appellant carriers (Record, 162), testified that:

> "The unloading of the livestock ought to be near the place where the slaughtering was done" (Record, 166).

Appellant carriers contend (Appellants' Brief, p. 44):

> "Thus, appellants having established their own facilities for unloading livestock in Chicago, cannot be compelled to establish at the stockyard another set of facilities at which they incur all obligations incurred by them at their own facilities."

The record is devoid of evidence that the appellants have established such facilities for unloading livestock in Chicago.

But where are these separate terminals? Are they readily accessible? The terminal on the Chicago & Northwestern R. R. in the Chicago Switching District, is at the town of Proviso, Illinois (R. 121), several miles outside of the city limits of Chicago and in the neighborhood of fifteen miles from the stockyards. If we should adopt the appellant carriers' contention, the carriers might, by extending that area which they call the Chicago Switching District sufficiently so as to bring the City of Milwaukee within the district, offer their livestock unloading facilities at Milwaukee as a sufficient alternative to their duty to furnish facilities at Union Stock Yards.

POINT V.

No error was committed by the inclusion in the order of the Commission of the Union Stock Yard and Transit Company as one of the defendants against which the order was directed.

(a) The Stock Yard Company is a common carrier subject to the jurisdiction of the Interstate Commerce Act.

Appellants contend that while the Stock Yard Company has been repeatedly held to be a common carrier subject to the jurisdiction of the Interstate Commerce Act, it is no longer so subject, and its inclusion as a defendant in the order of the Commission constituted error. Its removal from the class of common carriers is claimed to have been accomplished by certain changes in the forms of the leases

of the railroad which is still owned by the Stock Yard Company and which was previously leased to and operated by the Chicago Junction Railway Company, a common carrier, the stock of which railroad company was held by a holding company which also held and still holds the stock of the Stock Yard Company.

The Union Stock Yard and Transit Company was organized under a special charter of the Legislature of Illinois, dated February 13, 1865, (Exhibits 20, 21, Original Exhibits filed herein, pp. 10-26, R. 147). By the terms of its charter, under which it still operates (R. 209) it was authorized to construct and operate a public stockyards. Section 3 of the charter requires in mandatory language that the Stock Yard Company shall construct a railway so as to connect its tracks with the tracks of all the railroads then entering Chicago. By this section it was also given the power to make connections with such railroads in a manner which would enable the trains running on these line haul railroads "easily and conveniently to approach the grounds selected for" the stockyards. It was also given the power to "make such arrangements or contracts with such railroad companies or either of them for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed for the purposes aforesaid." The trunk line carriers entering Chicago at the date of the organization of the Stock Yard Company subscribed to $925,000 of the $1,000,000 authorized capital stock of the Stock Yard Company (R. 147, 52 I. C. C. 210, referred to by a witness for the Stock Yard Company at R. 147).

The language of the charter of the Stock Yard Company shows clearly that the company was organized for the

specific purpose of furnishing stockyard facilities to the line haul carriers entering Chicago, and that it was the intention of the organizers of the company so to construct the railway which the Stock Yard Company was organized to build as to enable the line haul carriers to move their own trains with their own engines and crews to the stockyards built by the Company as authorized in its charter. That purpose was evident in its charter, and that is the manner in which the line haul carriers have made deliveries to the yards of the Stock Yard Company from the time of its construction until the present time (R. 106, 135, 149, 162, 168, 174). The trains, engines and crews of the line haul carriers are permitted to move over the Junction only to the chutes and sidings of the Stock Yard Company (R. 164) and there is no through rate provided to industries on the Chicago Junction other than to the chutes and sidings of the Stock Yard Company (R. 179).

In 1897 the Stock Yard Company leased its rails to the Chicago & Indiana State Line Company, which later, through a consolidation, became the Chicago Junction Railway Company, for a period of 50 years at a rental of two-thirds of the earnings of the property. The stock of the Stock Yard Company and the Chicago Junction Railway Company was held by, and the companies were under the common control of, a New Jersey corporation, and this relationship still exists (R. 148).

This was the situation which existed when this Court held in *United States* v. *Union Stock Yard Company*, 226 U. S. 286, that the Stock Yard Company was a common carrier subject to the jurisdiction of the Interstate Commerce Commission.

Shortly after the decision by this Court in 226 U. S., the terms of the lease betwen the Stock Yard Company and the Chicago Junction Railway Company were changed. The railroad property of the Stock Yard Company was leased in perpetuity to the Chicago Junction for a rental of $600,000 a year (R. 147) but the services performed jointly by the Stock Yard Company and the Junction Company remained the same. When this arrangement was passed upon by the Interstate Commerce Commission in *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, the Stock Yard Company was again held to be a common carrier subject to the jurisdiction of the Interstate Commerce Act. (52 I. C. C. 209, at 221, 223). Another report in this case was later rendered by the Commission (58 I. C. C. 164), and the findings of the Commission in that case were sustained by this Court in *Adams* v. *Mills*, 286 U. S. 397. The plain inference of that case is that this Court approved the finding of the Commission that the Stock Yards still remained a common carrier (see 286 U. S. at 415).

Two years after the adverse finding of the Commission in 58 I. C. C. 164 an application was made to the Commission for the approval of the lease by the Chicago Junction of all its properties, owned and leased, to the Chicago River & Indiana Railroad Company, and of the purchase by the New York Central Railroad Company of all of the stock of the Chicago River & Indiana Railroad Company. The application was approved by the Commission, 71 I. C. C. 631; the lease was made with the consent of the Stock Yard Company (R. 148), and with minor modifications (see 150 I. C. C. 52) still continues. The Stock Yard Company still receives $600,000 per year as a return from its ownership of the rails over which the line haul carriers bring live-

stock in a continuous movement from the point of origin to its chutes and sidings. Aside from any technical rearrangements of the legal situation, *the actual working arrangements continue to be the same.* The line haul carriers still haul the cars under their own power to the unloading platforms. The Stock Yard Company still performs in fact all the other services.

Aside from its ownership of the rails over which the livestock is transported to destination, the Stock Yard Company performs a great variety of services of a common carrier nature which subject it to the jurisdiction of the Interstate Commerce Commission. The statement at page 15 of the Brief on behalf of the Stock Yard Company that the Stock Yards "has not been employed by the railroads to do for them more than to unload the livestock into unloading pens and to perform certain clerical services" is extremely inaccurate.

1. It owns, maintains and repairs the unloading platforms which are necessary for the unloading of livestock at the Chicago market (R. 149).

2. It owns, maintains and repairs the unloading chutes (R. 149).

3. It owns, maintains, repairs and operates the unloading pens (R. 149).

4. It performs the service of opening the car doors (R. 149).

5. It unloads the livestock delivered at its platforms (R. 135, 148, 149).

6. It takes charge of and disposes of all dead or crippled animals (R. 167), and keeps a record of the same (R. 150).

7. It weighs the livestock for the benefit of the line haul carriers to determine the amount of the freight charges (R. 108, 118, 119, 129, 154).

8. It makes out the freight bills and sends them to the consignees for payment (R. 106, 107, 154, 155, Ex. 11).

9. It collects the freight due (R. 106, 107, 154, 155, Ex. 11).

10. It guarantees to the railroads their freight charges (R. 150) and requires and receives a bond to cover such freight charges from the consignees (R. 115, 155).

11. It notifies the consignees of the arrival of their merchandise (R. 150).

12. It takes the numbers of the inbound and outbound cars and keeps the bookkeeping record thereof (R. 167).

13. Except in cases arising from the negligence of the Stock Yard Company, claims for damages to the consigned live stock even after unloading, are paid by the Railroads (R. 116, 160).

14. It provides watchmen to protect the property and policemen to protect it and keep order (R. 151).

15. It owns and maintains the exits from the unloading pens through which exits consignees are able to get their livestock away from the point of actual delivery either on to their own property or on to the public highway (R. 120, 121).

16. With respect to outbound freight, it does the reverse of all these things which it does with respect to inbound freight.

> "If the animals are purchased for shipment, the Stock Yards employees drive them to the Shipping Division and again act as Agent of the railroad companies in loading the animals from the chutes into the cars" (Testimony of Henkle, Vice President and General Manager of the Stock Yard Company, R. 153).

Henkle further testified (R. 153):

> "To perform all this service requires an organization and facilities which are very complete. • • • Handling stock in this fashion, both as to loading and unloading service and the yards service, is the only thing that renders practical the receipt, sale and delivery in the Chicago market of the animals that are handled there daily."

The foregoing catalogue of services are those services which the appellant Stock Yard Company in its brief has sought to belittle under the statement that "the Yard Company is the mere 'owner' of certain property 'used' by railroad companies and performs only certain labor and clerical activities for such railroad companies merely as their 'agent' " (Brief of Stock Yard Company, pp. 29 and 30).

The Stock Yards in fact constitute the livestock terminals of line haul carriers at Chicago as the Commission found in its report herein (R. 26). As this Court recently stated in *Adams* v. *Mills*, 286 U. S. at 409:

> "That the yards are in effect terminals of the railroads is clear. They are in fact used as terminals and necessarily so."

The appellant, in relying upon changes in the terms of its leases as a means of evading the jurisdiction of the Interstate Commerce Commission, has entirely misconstrued the reason why it was held to be and still is a common carrier subject to the jurisdiction of the Commission. The controlling fact relied upon by this Court and by the Commission in holding the Stock Yard Company subject to the Act relates to the services which it performed with respect to transportation. It is settled doctrine that this is the controlling factor in establishing its common carrier status.

U. S. v. *Union Stock Yards*, 226 U. S. 286;
U. S. v. *Brooklyn Terminal*, 249 U. S. 296.

This Court stated in *United States* v. *Union Stock Yard Company*, 226 U. S. at 304-305:

> "Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them."

Again, holding that the Brooklyn Eastern District Terminal was subject to the Hours of Service Act, this Court stated in *United States* v. *Brooklyn Terminal*, 249 U. S. 296, at 304:

> "We have merely to determine whether Congress, in declaring the Hours of Service Act applicable 'to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad,' made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. *The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the State of incorporation considers it such; but upon what it does. Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254. (Italics ours.)
>
> The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 306; 231 U. S. 274, 288. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities." (Italics ours.)

The present manner by which livestock is transported on a through haul from point of origin to point of desti-

nation, and the services performed by the Stock Yard Company in assisting in that complete transportation, are identical with those in effect when the original *Stock Yard* case was decided in 226 U. S. 286. The only distinction which could be drawn is that the Stock Yard Company instead of cooperating with the Chicago Junction Railway in the through delivery of cars of livestock is now cooperating with another lessee or sublessee equally subject to the Act.

Appellants contend that the Stock Yard Company is not a "common carrier engaged in the transportation of passengers or property wholly by railroad" within the meaning of paragraph 1 of Section 1 of the Interstate Commerce Act, relying upon *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, and *Chicago Refrigerator Co.* v. *Interstate Commerce Commission*, 265 U. S. 292, in support of this proposition. But these cases are clearly not applicable. In both the *Ellis* case and the *Chicago Refrigerator Co.* case, neither of the corporations there held not subject to the Act performed any common carrier functions. They merely furnished to the railroad company facilities used by it in performing such functions. In neither case did the corporation sought to be held subject to the Act have any control over the instrumentalities of transportation in the possession of the common carriers which were using them. This is the point relied upon in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. at 443, in holding the Armour Car Line not subject to the Act, and is similarly relied on in *United States* v. *Interstate Commerce Commission*, 265 U. S. 292.

Here, however, the Stock Yard Company has actual control over certain phases of the beginning and comple-

tion of transportation, and, as has been held by the Commission, is a terminal of the line haul carriers in Chicago. The term "railroad" as defined in Section 1 (3) of the Interstate Commerce Act includes "terminals and terminal facilities". The reason for holding the car companies involved in the cases cited, *supra*, not subject to the Act therefore disappears. The Stock Yard Company here is a terminal and has terminal facilitites within the meaning of Section 1 (3), and is engaged in transportation as therein defined to include "receipt, delivery, * * * and handling of property transported."

No contention is made, as suggested in the brief of appellant carriers at 63, that the Stock Yard Company is a common carrier *because* it is an agent of the line haul carriers. Exactly the reverse is true. The Stock Yard Company is a common carrier *even though it be* an agent of the railroad company in the performance of transportation services. *U. S.* v. *Brooklyn Terminal*, 249 U. S. at 304; *Adams* v. *Mills*, 286 U. S. at 415.

(b) The Stock Yard Company would have been subject to the order of the Commission herein whether or not it was included in said order by name. It is in any event the agent.

The Commission has found that the yards of the Stock Yard Company constitute the livestock terminals of the line haul carriers entering Chicago (R. 26). This finding is amply sustained by the evidence contained in the record, a resume of which is set forth herein, *supra*, at pages 37-40 and 47-51. It is there shown that the tariffs now filed by the Stock Yard Company with the Commission designate that Company as the agent of the line haul carriers in loading and unloading the livestock (Ex. 22). We have catalogued

above at pages 50, 51, the numerous additional services performed by the Company as the agent and for the benefit of the line haul carriers.

Even though the Stock Yard Company had not been included by name in the order issued by the Commission, it would have been required to abide by that order as the agent of the carriers. Section 16 (7) of the Interstate Commerce Act, 49 U. S. C. A. Section 16 (7), 34 Stat. 591, provides:

> "It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders (of the Commission) so long as the same shall remain in effect."

The evidence amply demonstrates that the Stock Yard Company is the agent of the line haul carriers making deliveries of livestock at Chicago. As such, it would be required by the terms of Section 16 (7) to abide by the order of the Commission made herein even though it were not named therein.

The Stock Yard Company is enabled to collect and retain the yardage charges in issue by reason of the practice whereby the line haul carriers have constituted the yards of the Stock Yard Company their terminals for the delivery of livestock in Chicago. They have placed it in the power of the Stock Yard Company to collect these additional charges for the mere service of delivery, and it is entirely proper that the order of the Commission should be directed against them jointly for the practice jointly pursued. *Adams* v. *Mills*, 286 U. S. 397, at 415.

The contention made by the counsel for the Stock Yard Company in his brief (p. 30 thereof) that:—"Only in con-

nection with criminal provisions of the Act are 'agents' of railroads directly regulated when not themselves common carriers" is, we believe, in the light of the provisions of Section 16 (7) of the Act above referred to, entirely erroneous.

POINT VI.

The findings contained in the report of the Commission, and the order entered upon said findings are definite and certain.

(a) The findings of the Commission with respect to the point at which the transportation service of the carriers terminates are definite and certain.

The Commission found in its report "that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens" (R. 31).

Based upon this finding, the Commission entered its order requiring appellants "to abstain from the practices described in the aforesaid report which subject complainant to the payment of yardage charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes" (R. 38).

Appellants contend that this finding of the Commission and the order based thereon do not define their obligations with sufficient exactness (Brief in No. 606, at 58, 59). They apparently contend that the Commission should have, in addition to the above finding, stated the number of minutes or hours within which a consignee should be required to

accept delivery of his livestock, in order to avoid the payment of a yardage charge.

The Commission found, however, that under the conditions existing at the yards of the Stock Yards Company, no definite number of minutes could be prescribed as a reasonable time within which consignees must accept delivery of their live stock to avoid paying the yardage charge. The Commission stated in its report:

> "A charge for the yardage of livestock after consignee has not taken advantage of any reasonable opportunity afforded to obtain prompt delivery is not a violation of any provision of the Interstate Commerce Act. What constitutes a reasonable opportunity may be determined from the circumstances at the particular yards concerned" (R. 29).

The Commission then reviewed the conditions existing at the yards of the Stock Yards Company to determine what would constitute a reasonable opportunity at those yards. It found that at certain times of the day, livestock was required to be removed from the yards within two minutes after its arrival. At other times of the day, it found that the livestock may remain in the unloading pens for longer periods (R. 29-30). The Commission later stated:

> "There cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock and the accomplishment of proper delivery to complainant" (R. 30).

Having found that the unloading pens were suitable pens from which the Hygrade Company might accept delivery, the Commission held that the time within which livestock must be accepted by the Hygrade Company and

removed from the yards of the Stock Yard Company varied with the promptness with which operating conditions at the yards required that the livestock be removed from the unloading pens. The Commission held in effect that a reasonable time for accepting livestock at the yards of the Stock Yard Company varies from time to time, and it fixes a method by which that variance may be determined pragmatically. If the Hygrade Company receives its livestock at the unloading pens, the Commission holds that it receives nothing more than the transportation service of delivery. But if the livestock is removed from the unloading pens by employees of the Stock Yard Company and placed in holding pens, then the Commission states that a stock yard service is rendered for which a charge may be imposed. *And the employees of the Stock Yard Company may remove the livestock from the unloading pens at any time after their arrival if the employees of the Hygrade Company are not there ready to receive them.*

The test laid down by the Commission to determine whether or not the transportation service is ended is the same as that now being applied by the Stock Yard Company in keeping its records. The General Manager of the Stock Yard Company sought to introduce in evidence before the Commission a statement showing all shipments arriving at the yards consigned to the Hygrade Company during the year ending with the month of September, 1931. The exhibit was objected to, and a substitute was ordered to be furnished (R. 157). The exhibit submitted showed that some of the livestock delivered to the Hygrade Company was "yarded" and that others were "delivered". Asked to explain the terms used, the witness stated (R. 157):

> "By the term 'yardage' as shown on that exhibit I mean that employees of the Stock Yards Company have removed the animals from the chute pens in all cases where it said 'yarded'. In the case of those cars after which appears the word 'delivered' it means that the employees of the Hygrade Corporation themselves took delivery of the animals directly from the unloading chutes. That is all it means."

A substitute exhibit was furnished subsequently as Exhibit 24, Original Exhibits herein at pages 37-48, where the same distinction is made.

Since the records made by the Stock Yard Company for the benefit of appellant carriers are already kept on the basis which the Commission found applicable, there will be no such difficulty as appellants suggest in determining what cars of livestock have received mere transportation services, and what cars have received yardage services.

(b) There was no necessity for the Commission's finding in this proceeding what arrangement should be made by appellants to comply with the order of the Commission. The manner in which the practice condemned was to be eliminated was left to the discretion of appellants.

A finding as to the manner in which appellants should comply with the order of the Commission was not necessary to a determination of this case. The Commission found that the practice jointly pursued by the railroads and the Stock Yard Company whereby yardage charges were assessed on livestock for which no service in addition to transportation had been rendered was unlawful, and ordered that it be discontinued. The Commission had no obligation to pre-determine what the appellants should do as a lawful alternative to their present unlawful practice.

The Commission left to the discretion of the defendants before it the determination of the manner in which the practice should be discontinued. Various alternatives are open to the appellants. Appellant carriers may reach an agreement with the Stock Yard Company with respect to the amount to be paid by the appellant carriers to the Stock Yard Company for the performance of appellant carriers' transportation duty of making delivery without charges in addition to the lawfully published tariff rates. If its revenues from the transportation of livestock are insufficient to bear the charge which it is required to pay, it may increase its rates pursuant to the provisions of Section 6(3) of the Interstate Commerce Act. The Commission is fully empowered to pass upon the reasonableness of any increase, and the necessity therefor (see Interstate Commerce Act, Section 15(7)).

If appellant carriers and the Stock Yard Company cannot agree upon the charge which should be paid by appellant carriers to the Stock Yard Company merely for permitting the Hygrade Company to come upon its grounds and drive its own livestock with its own men out of such yards where appellant carriers have delivered them, appellant carriers may make application to the Interstate Commerce Commission under Section 15 (3) of the Act to establish through rates and joint rates, fares or charges and the divisions of such rates, fares or charges. The jurisdiction of the Commission to entertain such a proceeding was pointed out to the carriers when they made a similar contention in *Live Stock Loading and Unloading Charges*, 58 I. C. C. 164, where the Commission stated, at 167:

"The apprehensions of the line-haul carriers that the stockyard company may make any charge it pleases, which they will be required to pay, are not well founded. Upon their complaint or upon the complaint of any party, we can examine any of the charges that make up the sum of the through charges, and may prescribe just and reasonable rates for all carriers concerned, either by prescribing through rates and joint rates and the divisions thereof, or otherwise, as the facts may warrant."

Or appellant carriers may, if they desire, establish facilities at substation Union Stock Yards other than the yards of the Stock Yard Company at which consignees may obtain delivery of their live stock without being forced to pay a charge in addition to the line haul rates for that mere service of delivery.

Similarly, they may amend their tariffs to provide for side track delivery at the Hygrade Company's plant at the same rate which applies to the chutes and sidings of the Stock Yard Company. The record shows that the Hygrade Company would be entirely satisfied with such delivery. It demanded it in its complaint filed with the Commission (R. 16), and introduced evidence to show that it had facilities to accept such delivery (R. 119, 120).

The Commission was not concerned in this case with which of the various alternatives open to appellants was adopted by them, so long as the present unlawful practice was terminated. Appellants should not be permitted to import into this proceeding brought by a shipper to correct an unlawful practice any dispute which appellants may have among themselves as to the method which they will

pursue to rectify the wrong presently being done. As this Court said in *Adams* v. *Mills*, 286 U. S. 397:

> "The question at issue is not the reasonableness of the charge, but the lawfulness of the practice, jointly pursued by the railroads and the company, of collecting the extra charge from the shipper. The reasonableness of the charge itself, and the complementary question whether the railroads should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto."

The order of the Commission, in leaving to the determination of the petitioners and the Stock Yard Company the manner in which the yardage charge should be disposed of, is in conformity with many similar previous orders of the Commission, the propriety of which have been consistently sustained by this Court.

American Express Co. v. *Caldwell*, 244 U. S. 617, at 625;
U. S. v. *Pennsylvania Railroad Co.*, 266 U. S. 191;
Chicago, I. & L. Ry. Co. v. *U. S.*, 270 U. S., 287, 292, 293.

In *U. S.* v. *Pennsylvania Railroad Co.*, 266 U. S. 191, an order of the Interstate Commerce Commission requiring certain railroads to desist from unjust discrimination therein found to exist was attacked. This unjust discrimination resulted from the carriers' switching over intermediate carriers without extra charge for seventeen manufacturers in York, Pa., while assessing a charge against other manufacturers for similar switching operations. The

order of the Commission did not indicate the manner in which the discrimination should be removed, and it was contended that the carriers, in order to remove it, would be required to extend their tracks, enlarge the common use of terminals, or equalize rates and charges for plants within and without the zone, that the Commission had thereby exercised power conferred upon it by Section 1, paragraph (21), Section 3, paragraph (4), or Section 15, paragraphs (3) and (4), without having made the findings appropriate to the exercise of its power under those sections. This contention was rejected by this Court, which stated at 199:

> "It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the withdrawal of any of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action."

Substantially the same contention was made against the validity of an order of the Commission directing the removal of unjust discrimination held to have been practiced against an electric railroad in the case of *Chicago, I. & L. Ry. v. U. S.*, 270 U. S. 287, and the same answer was made to the contention by this Court.

The assumption by appellant carriers that if, in their discretion, they choose to conform to the requirements of

the Commission's order by absorbing a charge of the Stock Yard Company, that charge will be in the amount presently collected from the Hygrade Company under the purported authority of schedules filed with the Secretary of Agriculture is entirely unwarranted. This charge is a charge for transportation, and its reasonableness is subject to review by the Commission just as that of any other transportation charge.

(c) The law does not require the Commission to specify in findings or report under what section of the Interstate Commerce Act it is proceeding.

Appellants complain that the Commission did not designate in its order the specific provision of the Act whereunder the order was made, and seek to establish that because thereof, the order is void.

It was entirely unnecessary for the Commission to state in explicit words what section of the Act it found had been violated. The findings of the Commission in its report indicate beyond doubt that the order was made pursuant to the provisions of Section 1(6) and Section 15(1) of the Act.

The complaint of the Hygrade Company before the Commission alleged that the practice of appellants in making the yards of the Stock Yard Company their depot for the receipt and delivery of livestock under an arrangement wherein and whereby the Stock Yard Company was permitted to and did impose a yardage charge upon the Hygrade Company was unjust and unreasonable, in violation of Section 1 of the Act (R. 23). The complaint also alleged that the yardage charges were collected without tariff authority in violation of Section 6 of the Act.

The Commission, after reviewing the record, made the following finding:

> "It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens" (R. 31).

Having made this finding, the Commission stated:

> "We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens" (R. 31).

The Commission determined from the evidence presented to it that no services other than transportation services were rendered by appellants on livestock delivery of which was taken by the Hygrade Company at the unloading pens. Having so determined, it had full authority under Section 1(6) and Section 15(5) to enter the order in question.

Section 1(6) provides, so far as here pertinent, as follows:

> "It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce • • • just and reasonable regulations and practices affecting • • • all other matters relating to or connected with the receipt, handling, transporting, storing, and delivery of property subject to the provisions of this chapter • • • and from unjust and unreasonable classification, regulation and practices prohibited and declared to be unlawful."

Section 12 (1) of the Interstate Commerce Act provides:

> "The Commission is authorized and required to execute and enforce the provisions of this chapter."

Section 15 (1), so far as here pertinent, provides:

> "Whenever after full hearing upon a complaint made as provided in Section 13 of this chapter * * * the Commission shall be of opinion * * * that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation, or practice is or will be just, fair and reasonable to be thereafter followed, and make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist."

The Commission here found that no services were being rendered with respect to livestock delivery of which was taken at the unloading pens. It further found that such charges were being assessed. It therefore became its duty under Section 12 (1) and 15 (1) of the Act to make an order directing appellants to cease and desist from the practice by reason of which the unauthorized charges were being assessed. This it did, and it was in no wise necessary that the Commission specify the Section of the Act under which it made the order.

A similar order made by the Commission was sustained by this Court in *Los Angeles Switching* case, 234 U. S. 294. That case involved the validity of an order of the Commission made upon complaint of the Associated Jobbers of Los Angeles which complaint was directed against *two distinct practices*, involving the spur-track switching charges incident to a system-line haul and to a foreign-line haul respectively. A charge in addition to the line-haul rates had been imposed by the line-haul carriers entering Los Angeles for deliveries on spur tracks built by the carriers in that city. The Commission found that these spur tracks were portions of the terminal facilities of the carriers. The only finding of the Commission is contained in its report (23 I. C. C. 310) at 318, where it states:

> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done."

Based upon this finding, it entered an order, quoted in full in *Los Angeles Switching* case, 234 U. S. at 302-303, note, which is substantially identical in form with the order which is here attacked.

This Court sustained the order, stating at 311:

> "But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.
>
> Such a question is manifestly one upon which it is the province of the Commission to pass."

The facts of the case and the form of the order in the *Los Angeles Switching* case and in the instant case are substantially identical. In both cases, the consignees complained of the practice of exacting a charge in addition to the line-haul rates for a service which was not in addition to the transportation service requested. In both cases the Commission found upon the facts presented that no service in addition to transportation services was performed. In neither case did the Commission expressly refer to the specific provision of the Act under which it made the order complained of, but acted as it had the authority and duty to act, under Section 12 (1) and 15 (1) of the Act, to prevent an unlawful practice which it found to exist.

This Court sustained the order of the Commission in the *Los Angeles Switching* case. The order in the instant case is substantially identical, and it should be sustained.

IN CONCLUSION.

POINT VII.

The decree of the District Court should be affirmed.

Respectfully submitted,

CARL M. OWEN,
HAROLD J. GALLAGHER,
Counsel for Hygrade
Food Products Corporation,
Appellee.

16

SUPREME COURT OF THE UNITED STATES.

Nos. 606, 607.—October Term, 1935.

The Atchison, Topeka and Santa Fe Railway Company, et al., Appellants, 606 *vs.* The United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation.	Appeals from the District Court of the United States for the Southern District of New York.
The Union Stock Yard and Transit Company of Chicago, Appellant, 607 *vs.* The United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation.	

[April 29, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

These are separate appeals from a decree of a three judge court dismissing a suit to enjoin enforcement of an order of the Interstate Commerce Commission. 8 F. Supp. 825. The suit was brought by 24 railroads, appellants in No. 606, for convenience called "carriers", against the United States and Interstate Commerce Commission. Twenty-one are line carriers; the other three perform only switching service. The Union Stock Yard & Transit Company, appellant in No. 607, and the Hygrade Food Products Corporation, the complainant before the Commission and one of the appellees here, intervened.

By its complaint to the Commission the Hygrade Company attacked as unreasonable in violation of § 1 of the Interstate Commerce Act (Title 49, U. S. C.) the carriers' tariff charges applicable to switching livestock to its packing plant. And it assailed as inapplicable the yardage charge collected by the Yards Company on livestock delivered at the stockyards. It claims that the service covered by the charge is included in transportation, §§ 1 (3), 15 (5); that, not being specified in carriers' tariffs, they are unlawful, § 6; and that the practice of the carriers and Yards

Company in making the stockyards their depot for delivery of livestock pursuant to an arrangement by which the Yards Company imposes a yardage charge is an unjust and unreasonable practice in violation of § 1.

Subject to regulation by the Secretary of Agriculture under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C., c. 9, the Yards Company operates public stockyards in Chicago. The Hygrade Company in 1929 acquired and has since operated a packing plant that many years ago was established on the Chicago Junction Railway a short distance from the unloading pens in the stockyards. Tracks of the Junction Railway extend into, and are used to haul dead freight to and from, the Hygrade plant. The charge for switching livestock into the plant is $12 per car. To avoid that burden, the Hygrade Company elects, as did its predecessors, to have all livestock intended for slaughter at the plant shipped to the stockyards. These yards are livestock terminals of the carriers and are served by trains operated by them over the tracks of the Junction Railway. Each carrier's tariff specifies rates covering transportation of livestock to Chicago including delivery to consignee on the carrier's own line. But, as practically all shipments to Chicago are consigned to the public stockyards, there is little, if any, need or use of individual carrier unloading facilities.

To cover the movement over the Junction railway to the public stockyards, western carriers add to the Chicago rate $2.70 and eastern carriers $1.35 per car. No additional charge is made for unloading. The carriers employ and pay the Yards Company for unloading the livestock the amount—$1 per car—specified in its tariffs filed with the Interstate Commerce Commission. That work is accomplished by means of platforms and chutes down which the animals are driven from the cars into pens. These pens are not suitable places in which long to hold livestock. At peak periods of stock train arrivals these facilities are so much in use that the Yards Company is able to permit the animals to remain in the unloading pens only a short time—often not more than a few minutes. And, unless promptly taken away by consignee, the Yards Company transfers them to holding pens.

About 85 per cent. of all consignments to the Hygrade Company are so transferred. The others are by it taken from the unloading pens and driven through ways or alleys within the extensive yards properties over scales, where for the purpose of computing freight

charges they are weighed, to and along an elevated runway over pens in the yards and the tracks of the Junction Railway, thence to and through a tunnel, under the proposed extension of Pershing Road (located along what was formerly a part of the Chicago River) ending at the Hygrade Company's plant which abuts on that highway. The Yards Company, in accordance with its tariffs filed with the Secretary of Agriculture, makes and collects a specified charge per head on all livestock received in the yards—being 35, 25, 12 and 8 cents respectively for cattle, calves, hogs and sheep. These charges apply to animals taken by the consignee immediately from unloading pens to its plant as well as to those transferred by the Yards Company to the holding pens later to be taken by consignee. The tariffs of the Yards Company also specify charges for other services.[1] As to each carload, it makes a statement showing separately the carrier's charges and its own. It collects the total, accounts to the carriers for those covered by their tariffs filed with the Interstate Commerce Commission and retains the balance.

The report of the Commission (195 I. C. C. 553) states: The stockyards are livestock terminals of the carriers. Consignees are entitled to delivery at suitable pens without charge for the mere placement therein of the livestock. The unloading pens are suitable for the accomplishment of proper delivery to consignee. The method of handling is efficient and satisfactory. The fact that the carriers have at Chicago destinations other places of delivery where no charge is made is not a legally sufficient reason for an extra charge at the stockyards. As to about 15 per cent. of all shipments consigned to complainant "it has taken delivery before the animals were placed in holding pens". There is no occasion for putting them in holding pens if prompt delivery is desired. The fact that other freight is subject to storage or demurrage charges only after the lapse of considerable time is not a sufficient reason why similar rules should apply in respect of yardage charges on livestock. After unloading, livestock requires unusual attention and care such as is not required by other freight.

The Commission concluded: The switching charge is not shown to be unreasonable or otherwise unlawful.

[1]They include: Feed and feeding, bedding, dipping and spraying, immunizing and incidental care of swine, cattle testing, cleaning and disinfecting of pens, etc., branding, and other special services.

Prompt delivery does not require pens to be so equipped as to provide rest, feed and water for livestock. If placement into pens that are so equipped is desired, an extra charge therefor is not within the inhibition of § 15.

There are no services performed after unloading for which defendants may assess charges in instances where delivery is taken at the unloading pens. The livestock in carloads consigned to complainant at the yards is not subject to yardage charges in instances where delivery is so taken. Complainant is entitled to reparation.

The Commission ordered that the carriers and Yards Company cease and desist from practices which subject complainant to payment of yardage charges on livestock, in instances where delivery is taken at the unloading pens, and that the proceeding may be reopened to ascertain the amount of reparation.

Appellants contend that transportation ends with unloading of livestock into suitable pens and that, for lack of essential findings of fact, the order is void.

Transportation of ordinary livestock in carload lots from and to points other than public stockyards has always been deemed to include furnishing of facilities at the place of shipment for loading and at destination for unloading and suitable ways for convenient ingress and egress. *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 134-135. *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465, 468. 2 Hutchinson, Carriers, 3d ed., § 510. Cf. *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70, 74. And, in the absence of understanding or agreement to the contrary, transportation includes loading and unloading. 4 Elliott, Railroads, 3d ed., § 2346. *Indiana Union Traction Co.* v. *Benadum*, 42 Ind. App. 121, 123. *Davis* v. *Simmons* (Tex. Civ. App.), 240 S. W. 970, 976. *Massey* v. *Texas & P. Ry. Co.* (Tex. Civ. App.) 200 S. W. 409, 410. *Benson* v. *Gray*, 154 Mass. 391, 394.

But for many years, in virtue of custom and as well by the terms of shipping contracts in general use, that burden has been laid upon shippers. 2 Hutchinson, Carriers, 3d ed., § 711. *L. & L. F. Ins. Co.* v. *R., W. & O. R. R. Co.*, 144 N. Y. 200, 205. Indeed, October 21, 1921, the Interstate Commerce Commission, acting under authority of § 15 (1) and following a form of clause submitted by shippers and carriers, prescribed a uniform livestock contract containing § 4 (a): "The shipper at his own risk and expense

shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision". 64 I. C. C. 357, 363, App. F. But the practice has long been otherwise at the Chicago Union Stockyards. For more than 50 years prior to 1917 the carriers without any additional charge to shipper or consignee unloaded livestock into pens provided by the Yards Company. *Adams* v. *Mills*, 286 U. S. 397, 410. Paragraph (5) of § 15 enacted in 1920 made the practice general and compulsory in public stockyards throughout the United States. And the Yards Company has always collected a charge on all animals received in its yards. It may be assumed that shippers, commission men and packers including the Hygrade Company have had knowledge of this long existing practice.

Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock received.[2] The Packers and Stockyards Act approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the receiving, holding and delivery of livestock.[3] Section 406 provides that the Act shall not

[2]Section 15 (5) of the Interstate Commerce Act, added by § 418 of the Transportation Act, 1920, 41 Stat. 486, provides:

"Transportation wholly by railroad of ordinary livestock in car-load lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards". 49 U. S. C., § 15 (5).

[3]"The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock". 7 U. S. C., § 201 (b).

affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission.[4]

There is here involved no question as to the adequacy of individual carriers' unloading or other facilities for the delivery of livestock. The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant. Consignee sought free delivery in cars switched into its plant but the Commission found the switching charge not unreasonable. Consignee also sought free use of the Yards Company's properties including the overhead runway to take its animals from holding pens as well as from unloading pens to its plant. The Commission held against it as to the first and in its favor as to the other of these demands.

Long continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier. *Adams* v. *Mills, supra,* 410. So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as is included in transportation of livestock to destinations other than public yards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways. Transportation does not include delivery within the Hygrade plant or the furnishing of the properties, overhead runway and all, that are used for that purpose. Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by § 15 (5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

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[4] "Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission". 7 U. S. C., § 226.

The Commission's ruling that the imposition of the yardage charge on animals taken by consignee from holding pens does not violate the Act implies that as to those animals transportation ended at the unloading pens. On the other hand, its ruling that in the instances where consignee takes delivery at unloading pens the animals are not subject to the yardage charge suggests that delivery is not completed by unloading into suitable pens. That necessarily implies something more to be done or furnished by the carrier. But the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States*, 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86. *Inter. Com. Comm'n* v. *Chicago, &c. R'd Co.*, 186 U. S. 320, 341.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 606 and 607.—October Term, 1934.

606
The Atchison, Topeka and Santa Fe Railway Company, et al., Appellants,
vs.
The United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation.

607
The Union Stock Yard and Transit Company, of Chicago, Appellant,
vs.
The United States of America, Interstate Commerce Commission and Hygrade Food Products Corporation.

Appeals from the District Court of the United States for the Southern District of New York.

[April 29, 1935.]

Mr. Justice Stone.

I think the judgment should be affirmed.

The Interstate Commerce Commission found that the stock yards are the live stock terminals of the carriers; that a "yardage charge" per animal is assessed on all shipments of live stock delivered by the carriers at the stock yards; that the charge is imposed whether the live stock is taken by the consignee directly from the unloading pens or from the holding pens, to which the animals are taken if not immediately removed by the consignee upon arrival; and that appellee removes about 15% of all shipments consigned to it directly from the unloading pens. Upon the basis of these findings the Commission concluded that the yardage charge upon live stock removed from the holding pens is proper, but that the charge is improper and unlawful when made upon live stock received by the consignee and removed immediately upon arrival from the unloading pens and the yards.

These findings are thus the complete and obvious equivalent of a finding that a charge in addition to the scheduled tariff rate is

imposed on consignees, including appellee, for the bare privilege of access to the unloaded live stock for the purpose of its immediate removal from the carriers' terminal. They are ample to raise the questions of law decided below and presented here, whether the charge is lawful and whether the Commission has jurisdiction to forbid it. The precise point in space at which delivery is complete, or where transportation ends, is immaterial. For whether it ends when the cattle are placed in the unloading pens or only when the consignee removes the live stock from the terminal, the questions remain whether a charge levied upon the privilege of removal from the carriers' terminal is lawful and whether, in any case, the Commission has jurisdiction.

It appears that appellee drives the live stock to its place of business, in part over a viaduct, belonging to the stock yards, and in part through a tunnel, the ownership of which does not appear. But the order of the Commission does not require the use of either the viaduct or the tunnel for that purpose, or forbid a charge for their use. It only forbids yardage charges "where delivery was or is taken at the unloading pens." Appellants are thus left free, after removing the condemned charge, to provide any reasonable means of free access to the stock yards terminal for the purpose of proper removal of the live stock from the unloading pens. See *Warehouse Co.* v. *United States*, 283 U. S. 501, 513; *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States*, 270 U. S. 287, 292, 293.

In thus declaring that it is a part of the duty of a common carrier of live stock by rail to provide costless facilities for its delivery and immediate removal by the consignee on arrival at its destination, the Interstate Commerce Commission did not announce any novel rule of law. A carrier can no more lawfully add such a charge to the scheduled rate for the transportation service than it could demand a toll of a passenger, who had paid his fare, for alighting at or passing through its railway station upon arrival, or for removal of his hand bag delivered to him from its baggage car. This was specifically stated by this Court in *Covington Stock-Yards* v. *Keith*, 139 U. S. 128, 135, in declaring unreasonable and unlawful any charge for delivery and prompt receipt of the live stock, made by a company whose stock yards had been designated by the rail carrier as its delivery station.

Section 1 of the Act to Regulate Commerce, as originally enacted in 1887, c. 104, 24 Stat. 379, continued this duty of common car-

riers by rail by providing that the charges for the transportation of passengers or property "or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just." The Act, as amended, amplifies this duty by providing in § 6 (1) of the Interstate Commerce Act that rate schedules shall "state separately all terminal charges," and by § 6 (7) which prohibits rail carriers from receiving any greater or different compensation for transportation of passengers or property "or for any service in connection therewith, between the points named in such tariffs than the rates" which are specified in the filed tariff. Section 1 (3) of the Act gives to the Commission jurisdiction over "terminal facilities of every kind used or necessary in the transportation of persons or property . . . including all freight depots, yards and grounds, used or necessary in the transportation or delivery of any such property," and further provides that the term "transportation" as used in the Act shall include "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery . . . and handling of property transported." The Commission is thus given jurisdiction over the terminal services of each carrier incidental to the transportation and delivery of freight which could in any wise affect the charges or rates for the transportation service which they undertake to render. Even storage of goods at destination is a part of the transportation service, in the sense of the federal act, and subject to the jurisdiction of the Commission. *Southern Railway* v. *Prescott*, 240 U. S. 632, 637; *Cleveland & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588.

When Congress enacted the Packers and Stock Yards Act of 1921, c. 64, 42 Stat. 159, it gave to the Secretary of Agriculture regulatory jurisdiction over public stockyards, including specified stock yard services, but it was provided by § 406 (a) that "nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

This duty of the carrier, and the jurisdiction of the Commission to compel the performance of it, were recently recognized and reaffirmed by this Court in *Adams* v. *Mills*, 286 U. S. 397, 409-415,

upholding a reparation award by the Commission against the carrier and the Chicago Stock Yards for an unloading charge not absorbed by the carrier or included in its schedule of tariffs. It was held that the yards used by the carrier as a place of delivery were terminals of the railroad company regardless of their ownership, see *Warehouse Company* v. *United States, supra,* 513, that unloading the live stock was a transportation service for which no charge could be made which was not designated in the filed tariffs, and that the Commission had jurisdiction to forbid the unlawful practice and to order reparations for the overcharge. See also *Cleveland & St. Louis Ry. Co.* v. *Dettlebach, supra; Southern Railway Co.* v. *Prescott, supra.*

To avoid these plain provisions of the statutes of the United States, and the unambiguous definition by this Court of the duty of a rail carrier of live stock, appellants rely on an ingenius interpretation of § 15 (5) of the Interstate Commerce Act. This section, so far as now material, provides that transportation by railroad of ordinary live stock in carloads, received at public stockyards, shall include "all necessary service of unloading and . . . delivery at public stock yards of inbound shipments into suitable pens . . . without extra charge therefor to the shipper, consignee or owner . . . ." It is said that this legislation, by requiring the carrier to deliver the live stock into suitable pens and by prohibiting any extra charge for all necessary service of unloading the live stock, has left the carriers and the stock yards company, acting together or independently, free to charge the consignee or owner a toll for the privilege of removing his live stock from the stock yard terminal of the carriers.

In view of the consistent policy of the law, and the persistent but unsuccessful efforts of carriers and stock yards to impose forbidden charges for carrier service attending the unloading and delivery of the live stock, it would seem that the words, "all necessary service of unloading and . . . delivery" of live stock at a stock yard might fairly be taken to include all those incidental services at a terminal which the carrier is bound to render for its scheduled tariff and that "suitable pens" to which the carrier must make the delivery must at least be taken to mean pens to which the consignees may gain unimpeded access for the purpose of removing their stock. But if such is not the meaning of its language, and the

statute speaks only of delivery of the live stock into the pens capable of holding them, it is difficult to see upon what principle of statutory construction it can be said that the section, by forbidding one unlawful practice, sanctions another which it does not mention. Its purpose was remedial, to remove an old evil, and not to sanction a crop of new ones by giving stock yards and rail carriers of live stock *carte blanche* to impose vexatious charges which for more than thirty years had been condemned by this Court as unlawful.

The section was added by way of amendment to the bill which became the Transportation Act of 1920, c. 91, 41 Stat. 456, in consequence of representations made to the Committee on Interstate and Foreign Commerce of the House in behalf of the American National Live Stock Association and the National Live Stock Shippers League. See 59 Cong. Rec. 674. Their representative made bitter complaint of the practices of carriers and stock yards, in adding terminal charges to the scheduled carrier rates, so that shippers could not know in advance the cost of the complete transportation service involved in taking live stock from the point of shipment into the hands of the consignee ready to receive it at point of delivery. The resolution of the Associations asked the enactment, as a part of the Interstate Commerce Act, of the rule of the *Covington Stock-Yards* case, and specifically "that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards . . . which shall include unloading into suitable pens and delivery therein at such stock yards . . . including such facilities as are necessary or in use for making such delivery." See Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4378, House of Representatives, 66th Cong., 1st Sess., pp. 139, 141, 874, 875, 881.

In introducing the amendment in the Senate, Senator Cummins, Chairman of the Interstate Commerce Committee, referred to the request of the Live Stock Association in emphasizing the purpose of the amendment, which he stated was to require the series of services rendered in connection with the transportation to be performed for a single scheduled rate. 59 Cong. Rec. 674. On the coming in of the conference report on the bill recommending it in its final form, the House Managers made a statement that the

purpose of the amendment was to provide that the "through rates on live stock should include unloading and other incidental charges." 59 Cong. Rec. 3264. The legislative history from beginning to end indicates unmistakably the single purpose to give the Commission authority to remove the very abuses described and forbidden by the Court in the *Covington Stock-Yards* case. It would be an incongruous result of this legislation if, by forbidding an unlawful charge for putting the live stock into the unloading pens, it had made lawful the same charge for taking it out, and had thus condemned the aggrieved shippers and consignees to the limbo from which they were earnestly striving to escape. An interpretation of a statute leading to an absurd result is to be avoided where reasonably possible, as it plainly is here. See *United States* v. *Katz*, 271 U. S. 354, 357; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

It is true that yardage charges have been imposed by the appellant stock yard for many years. But, as already indicated, the Commission found that the charge is lawful when the live stock is removed from the unloading to the holding pens, as is done with most shipments. It does not appear how long and how extensively the charge has been applied to live stock immediately removed from the unloading pens by the consignees. In any case, long continuance of an unlawful practice can neither excuse nor sanction it. See *Warehouse Co.* v. *United States, supra*, 511; *Louisville & Nashville Ry. Co.* v. *Interstate Commerce Commission*, 282 U. S. 750, 759; *American Express Co.* v. *United States*, 212 U. S. 522; *Los Angeles Switching Case*, 234 U. S. 294, 312, 313. I think that the Commission was right, in forbidding the yardage charge as applied to live stock taken by the consignee from the unloading pens, and that its order should be left undisturbed.

In the present state of the case it is unnecessary to consider whether the reparations part of the order was rightly directed to both the stock yards and the carriers, or should have been directed to the carriers alone.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.